United States Court of Appeals

for the Second Circuit

APPENDIX

76-6076

United States Court of Appeals

For the Second Circuit

B

Docket No. 76-6076

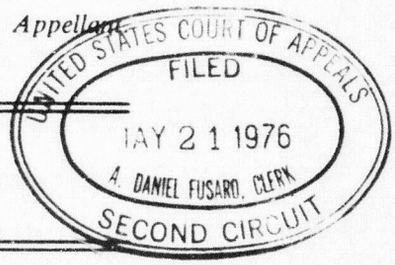
W. J. USERY, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,

Appellee,

against

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Appellant.



JOINT APPENDIX

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED JUN 16 1975 S.D. OF N.Y.

JAMES D. HODGSON, SECRETARY OF LABOR
U. S. DEPARTMENT OF LABOR,

Plaintiff,

-against- 72Civ 5031CBM

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

June 27, 1974
10:45 a.m.

Continued deposition of defendant by THOMAS F. O'CALLAGHAN, taken by plaintiff pursuant to notice dated June 2, 1973, at the offices of United States Attorney, Southern District of New York, Foley Square, New York, New York, room 329, before Julian Wolf, a Certified Shorthand Reporter and Notary Public of the State of New York.

VOL # 12

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United States Department of Labor.

o0o

xx T H O M A S F. O' C A L L A G H A N, resumed

xx CONTINUED EXAMINATION

BY MR. DANAS:

Q Captain, may I remind you that you are still under oath from the last portion of the deposition.

At the outset I would like to ask you whether you brought with you today any documents that were sought at the last session of your deposition?

A I wasn't requested to and I didn't bring any.

MR. SCHWARTZ: Let me just say for the record that we have been working on the list of items that were requested in Captain Lowen's deposition and also Captain O'Callaghan's.

My hope was that we would review the request for admissions again. And since the number of the documents that you asked to have admissions made as to their genuineness are also the documents that you asked for, I thought we could save time, because that number of instances, although we didn't previously admit it for whatever reason at the time, we will admit it now.

I thought we might save some time that way.

MR. DANAS: I appreciate that and I suggest that we save that for some point later in the day.

MR. SCHWARTZ: All right.

MR. DANAS: May we have this marked Plaintiff's Exhibit D for identification.

xx (Document marked Plaintiff's Exhibit D for identification.)

Q Captain, I show you a document that

has been marked Plaintiff's Exhibit D for identification and ask you whether you can identify it?

A Yes.

This is a newsletter sent out -- it is a newsletter on the resolution of affiliation with the ILA.

Q Does the document indicate a date upon which it was sent out?

A I don't know if it does or not.

Q Let me ask you this, Captain.

Did you have anything to do personally with the production, writing, preparation of that document?

A I undoubtedly ordered it done.

I don't recall my exact participation in it. I undoubtedly had some part in it.

Q What was your purpose in ordering that document prepared by whoever prepared it?

A Information for the membership.

Q What type of information?

A Information on the resolution that it contains.

Q The ILA affiliation?

A Yes.

Q May I see that for a moment?

A Yes.

Q Is it your recollection that this document was circulated to the membership of the Union?

A It probably was, yes.

Q Would that have been by mail?

A Possibly.

Q Possibly or probably?

A Probably. It probably was.

I think it was sent out. I would have to check it.

Q Was that sent out using the Union's master list of membership addresses?

A Whatever mailing lists we used, it was undoubtedly used; probably the membership mailing list that is used for the publications.

Q Is this document, Exhibit D for identification, a regular publication feature of the Union, or is this a special one-time only document?

A No. Usually after the convention there is a positive action letter, newsletter, or if it is not -- it doesn't conform right with the publication of the letter, there is a newsletter

usually sent out with the positive actions of the convention, of any convention.

Q Once again, sir, that we are clear on this, what was the purpose, as you saw it, in sending out this document?

A To make the membership aware of the pending referendum on affiliation with the ILA.

Q Well, beyond making them aware, what else did you have in mind, if anything?

A That I was in favor of affiliation with the ILA, for one thing, the convention was.

Q Basically it was a pro-affiliation document, was it not?

A It certainly wasn't anti-affiliation.

Q And it was meant to influence the membership with regard to voting for the affiliation?

A It was meant to let them know what the feeling of the Executive -- of their officials; how we felt about it.

Q And the feeling was positive, and by letting them know your feelings, you hoped to persuade them to feel the same?

A I hoped they would agree with me, yes.

Q In that connection there is included within this document statements of Teddy Gleason and John Bowers, are there not?

A Yes.

They were taken from the record of the convention.

Q On page 5 of Exhibit D, there is a statement by John Bowers in which he states, "I trust O'Callaghan and if O'Callaghan wasn't the top man here, I would think twice before saying I would want the affiliation to go through with the Masters, Mates and Pilots.

"O'Callaghan I trust."

With regard to that portion of Mr. Bowers' statement, what was your intent with regard to printing it or having it printed?

A I merely printed Bowers' statement. I didn't have any intent.

For any intent you would have to see Mr. Bowers on it.

Q This document was circulated in August of 1971, was it not?

A Yes.

Q And it was during that period that you

were up for re-election as the President of the International; is that true?

A I wasn't up -- I had been nominated, I believe.

I would have to check and see -- yes, I had been nominated then. It wasn't --

Q This document, Exhibit D, was circulated on August 19, 1971.

By that time you had been more than nominated. Correct?

The ballot committee was meeting, they were preparing ballots.

A I would have to check the record on that.

Q In any event, you were a candidate for President?

A That's correct.

Q For re-election?

A Yes.

Q At the time of the preparation of Exhibit D, did you see any problem with regard to the statements of John Bowers?

MR. SCHWARTZ: In what respect?

Q And your candidacy for International President?

MR. SCHWARTZ: In what respect, problems, which way?

Q With regard to the statements constituting campaign literature for re-election.

A No, I didn't see any.

Q None at all?

A No.

Q Who paid for the preparation and distribution of Exhibit D for identification?

A It was paid by the Union.

Q Do you recall what the dollar amount was with regard to that preparation and circulation?

A I would have to look it up.

MR. DANAS: Would you check the records, Mr. Schwartz, and provide us with the information sought in that regard?

MR. SCHWARTZ: Yes, we will do that.

MR. DANAS: Thank you.

Q Exhibit D for identification was the subject of a decision by Judge Thomas Croake of this court, was it not?

A That I don't know. I would have to ask my attorney if it was.

Q Well, would you consult with him and answer the question?

MR. SCHWARTZ: You so earnestly sought this deposition, I can stipulate to everything you ask for.

Of course, the answer is yes.

MR. DANAS: In that case, Mr. Schwartz, I would like to ask you if there would be any objection to a certain degree of leading the witness in the interest of time?

MR. SCHWARTZ: I would even make a better suggestion.

Except for the kind of question where you ask him "What was your intent" and that kind of thing, I would stipulate to the genuineness of the document, there is no question about it being the subject of Judge Croake's decision.

All that stuff can be agreed to. You don't have to waste time and money on that.

Q Well, just in the interest of time, Captain, your counsel has stipulated to the fact that Exhibit D was the subject of Judge Croake's opinion in this Court in or about September of 1971, and Judge Croake in that decision found

Exhibit D to be campaign literature on your behalf and perhaps others whom you were running with at that time.

He further found that the document was prepared and disseminated at Union expense.

As a remedy in that connection, he ordered the Union to circulate at its own expense campaign literature on behalf of Captain Sheldon and others of his slate.

Now, do you recall whether that was ever done?

A Yes.

MR. SCHWARTZ: Just a minute. I think you have got it wrong.

I don't think he ordered it. I could be wrong on this. I don't think that his judgment included a specific directive to distribute it. But in any event, it was done.

Q Well, what is your recollection, just so we get this straight, that it was voluntarily done?

MR. YOUNG: I thought it was ordered distributed. I will get the opinion.

MR. SCHWARTZ: Whatever it shows, it

shows. It will be there.

Q In any event, Captain, you do recall that these documents on behalf of Captain Sheldon and others were sent?

A Yes, that's right.

Q Do you recall when they were sent by the Union?

A No, I don't. Somewhere along in that period.

MR. SCHWARTZ: November, something like that?

Q Does late November 1971 refresh your recollection?

A I would have to look at the record.

MR. SCHWARTZ: I think it was sometime in the middle of November. We can stipulate to that fact.

MR. DANAS: I believe it was November 24th or 25th.

MR. SCHWARTZ: The record will show it.

Q Now, do you recall receiving from Captain Sheldon or others the text of the campaign literature that was to be sent on their behalf?

A I don't recall when I received it, but I evidently did.

Q Let me ask you this:

Do you recall whether you received the documents in printed form ready to be mailed, or whether the Union printed the campaign literature from rough drafts of the text?

A I don't know. I can't recall. I would have to go and find out --

MR. DANAS: In the interest of time, Mr. Schwartz, I would like the Union's records checked and the following information provided:

Number one, in what form the campaign literature was received by the Union from Captain Sheldon or others.

MR. SCHWARTZ: Slow down now.

MR. DANAS: All right.

B, by whom it was received in whatever form?

Thirdly, when it was received.

And then, the exact date on which it was sent out.

MR. SCHWARTZ: All right.

MR. DANAS: And the method of the mail-

ing, whether it was by mail, et cetera, and which mailing list was used for that purpose.

I am reminded, and I would like to put on the record at this point, that prior to the commencement of today's portion of Captain O'Callaghan's deposition the Government provided to counsel for the Union, Mr. Schwartz, a copy of the transcript of the first portion of Captain O'Callaghan's deposition and a copy of the transcript of the first portion of Captain Lowen's deposition.

MR. SCHWARTZ: That's correct.

MR. DANAS: And as we receive the second and succeeding portions they shall be so provided to you.

Q If we for a moment dismiss Exhibit D for identification, I would like to turn to any other campaign literature that you had prepared and sent out in your behalf subsequent to the Convention in 1971 and up to the talleying of the ballots in December of 1971.

Would you give me some idea as to the magnitude in dollar amounts and in numbers of mailings of such literature on your behalf or on behalf of those running on your national slate?

A I believe that I sent out one full mailing at my own expense. And the money was contributed by the people on the slate. I believe I could have sent more, but I think I only sent out one total mailing. I may have sent a follow up, but I would have to go and check. I have got all the records and my cancelled checks and everything of that sort that I spent on the elections.

Q When you refer to a full mailing, Captain, you refer to one document being mailed to all members of the Union?

A Yes, through the AAA.

Q I believe you testified last time that whatever was sent out in your behalf was presented by Wirth-Strahler, Inc., in Baltimore, Maryland?

A Yes.

Q Who is Harry Friedman?

A Harry Friedman?

Q Yes.

A He is a candidate. There is a Captain Friedman, but I don't know whether his name is Harry or not.

He's on the West Coast.

Q Yes, who is that gentleman?

A I don't believe I ever met him, but he's -- if he is the one I am thinking of he's a skipper that sails out of the West Coast.

Q You say you never met Captain Friedman?

A No, I don't believe I did. I don't ever remember ever meeting him, no.

Q Do you recall speaking with him orally on the phone or corresponding with him in any manner?

A He may have called me on the phone. I don't recall.

Q Isn't it true that he wrote a letter to you and that you had Wirth-Strahler, Inc. print 12,000 copies of that letter which you later circulated to the Union membership?

A Can I see the letter? I don't recall the letter.

Q I don't have a copy of the letter with me in the office here, or in our offices at all.

I am just asking you.

A I don't recall it.

Q You have no such recollection?

A I know that a letter was -- that Friedman sent out a letter during the campaign, but I don't

recall the circumstances of the letter.

Q You don't recall having 12,000 copies of it printed?

A I didn't have 12,000 copies printed, no.

Q Did you ever pay for the printing of 12,000 copies of that letter?

A I don't recall paying for it, no.

Q Do you recall having 12,000 -- the cost of printing 12,000 copies of that letter put on your account at Wirth-Strahler, Inc.?

A No.

Q Getting back to your own campaign literature, will you attempt as best you can recall, to put a dollar amount on the -- in terms of the campaign literature that you sent out?

A I got the checks and I won't attempt to put a dollar amount. I will tell you exactly what I spent. I did it all by personal checks.

Q Will you let us know?

A Yes.

MR. DANAS: We will leave a space in the record for that.

MR. SCHARTZ: Yes.

Q So your best recollection is that you sent out one piece of literature?

A I'm sure I sent out one that started the --

Q At least one?

A Yes.

Q What about Captain Lowen, do you know whether he sent any out?

A I don't think he sent any out other than what I sent out.

Q What about Captain Caldwell?

A No, I'm sure Captain Caldwell didn't. He's very tight with the dollar.

They all donated their share, you know, kicked in whatever -- I don't know whatever they kicked in, but I have a record of that, too.

Q Would you give us the benefit, as best that you can recall it, with regard to your thinking in 1971, in August, September, October, November, with regard to campaign literature and with regard to the magnitude of your mail list?

MR. SCHWARTZ: Is that a question? I have got to understand it to know whether or not

to object to it.

MR. DANAS: I will rephrase it.

Q In the period I just referred to you claim to have sent out perhaps one piece of literature --

MR. SCHWARTZ: He didn't say perhaps, he said definitely at least one.

Q At least one. And I think we will all agree that isn't very heavy campaigning, is it, one piece of literature.

A I never did campaign heavy at any time and I won't the next time.

Q And yet you testified the last time that in your experience, based on 20, 25 years of connection with the Union that all Union elections were very close, that 150 votes constituted a landslide; isn't that correct?

A That's correct.

MR. SCHWARTZ: In a democratic union.

MR. DANAS: In a democratic union.

Q And in light of that you felt comfortable with the magnitude of personal mailings at your expense that you referred to?

MR. SCHWARTZ: Comfortable in what

respect?

Q With regard to assuring re-election in 1971.

A I didn't comfortably or uncomfortably. It wouldn't have been the end of the world if I wouldn't have been re-elected and it won't be the end of the world if I am not re-elected this time.

Q Did you want re-election back in 1971?

A If I had been re-elected, fine. And if I didn't get re-elected someone else would have and I would have supported him after the election.

Q I am not asking you that, Captain. I realize it would not be the end of the world. But I am asking you whether given your preference you would have liked re-election.

MR. SCHWARTZ: Isn't that obvious?

A I wouldn't have ran if I didn't want --

MR. DANAS: It is not obvious, Mr. Schwartz, because Captain Lowen testified he didn't want it, he was drafted. Okay?

MR. SCHWARTZ: Fair enough, I do remember that.

Q I gather from your last statement, Captain, that you are seeking re-election in 1974?

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A I have not declared myself yet. We went over that last time.

Q I know we did. You made a definitive statement today and I thought there may have been a definitive announcement in the interim between our last meeting and today.

A I wouldn't make it here.

Q Well, you never know.

In that connection, I would like to ask you whether the Union is now in the process of conducting its pre-election procedures for 1974?

A Yes, the balloting is during the month of June.

MR. SCHWARTZ: Nominations.

A Nominations, rather. The nomination is only during the month of June for the Off-Shore Division and Pilot's Division.

Q When are the nominations for the International president and secretary-treasurer?

A At the Convention in August.

Q If you were to seek nomination for re-election in August, by when, under the Union's constitution would you have to announce your intention in that regard?

A After a certain number of days after the close of Convention, but I haven't looked at it -- you are nominated during the Convention, of course, you accept right there, but there is a period in case you are nominated by petition, ten days after the Convention, I don't know -- it is ten days after the close of nominations in June for those people to accept, but I would have to look up the constitution and see what it -- usually in the constitution you know who is going to run at the end of the Convention.

Q In any event, this past month, the month we are in now, June of 1974, nominations are open for Off-Shre Division officers?

A That's right. They are coming in every day.

Q Specifically, which officers within the Off-Shore Division are nominations now being received for?

A All officers where the men represent the Union, other than clerical work.

Q Name the officers, please?

A Very well. In New England, an agent and assistant port agent.

In New York --

Q Of what port?

A New England. New England, due to the action of the Executive Board --

MR. SCHWARTZ: Council.

A Executive Council, the Ports of Boston and Providence have been combined into the New England area.

Q When did that occur?

A Three or four months ago at the last Off-Shore Division Executive Council meeting for reasons of economy and due to the fact that Boston and Providence have gone down to practically nothing as far as shipping goes.

Q Which other officers?

A In New York, the port agent, the executive assistant port agent and four assistant port agents.

The Port of Philadelphia it has been combined under the Port of Baltimore and there will be an assistant port agent in Philadelphia.

In Baltimore there will be a port agent and two assistant port agents.

The executive assistant port agent's

job in Baltimore has been abolished.

In Norfolk there will be a port agent and assistant port agent.

In Charleston, South Carolina --

MR. SCHWARTZ: I don't remember myself.

A There will be an assistant port agent in Charleston, a port agent.

MR. SCHWARTZ: Check.

A I would like to check that. I think -- I won't say for sure in Charleston.

In Jacksonville, Florida, there will be a port agent.

In Mobile, Alabama, a port agent.

In New Orleans, port agent and three assistant port agents.

In Galveston, a port agent, executive -- I mean, a port agent, vice president of the Gulf and an assistant port agent.

In Houston, there will be a port agent and assistant port agent.

Los Angeles, port agent and assistant port agent.

San Francisco, a port agent, executive assistant port agent and three assistant port agents.

And Seattle and Portland, port agents.

The executive assistant port agents in Baltimore and New Orleans have been abolished.

Q With regard to the abolition of those last two mentioned positions and the others that were abolished that you mentioned and with regard to the merger in New England and in the Philadelphia port that you mentioned, were all of those actions taken at an Executive Council meeting?

A Yes.

MR. SCHWARTZ: The Off-Shore Division Executive Council, pursuant to a referendum adopted among the Off-Shore Division members.

MR. DANAS: I would like to get that. When was that referendum held?

MR. SCHWARTZ: I will give you the exact date. Roughtly it was held about six or eight months ago, authorizing the Off-Shore Division Executive Council to do what they did.

MR. DANAS: And that was with regard to the abolition of positions and the merger of ports?

MR. SCHWARTZ: On the basis of economy and things of that sort.

MR. DANAS: Just in the interest of

time, I gather that was a referencum open to all Off-Shore members?

MR. SCHWARTZ: Correct.

Q Were there any other changes in the Union's structure that occurred in the last two years that we have not discussed and that we have not been provided with, or that are not provided for in the new constitution.

In other words, changeover and above --

MR. SCHWARTZ: What we can do for you, if you want, is tell you what referendums have taken place. We referred to it in some of the papers that have been served in other procedures. All of these changes are done pursuant to referendum.

So, we will tell you what referendums.

MR. DANAS: Are the referendums, just so I understand it, held subject to the Executive Council decision on these matters?

MR. SCHWARTZ: No. They have to be authorized to take certain action before they can take it. The action is authorized, it is not done and then ratified.

In other words, the Executive Council is authorized to do certain things if they find

such things.

MR. DANAS: In other words, the Executive Council rubber stamps the referendum?

MR. SCHWARTZ: The trouble is the way you blanketly characterize things. Rubber stamp is not the proper word. They don't rubber stamp it. They don't see what the referendum says.

MR. DANAS: They are authorized to do it?

MR. SCHWARTZ: Authorized to do it. They may or may not do it. They are given some general guidelines.

MR. DANAS: Let's go back.

Who authorizes the referendum to take place? How does that come back?

MR. SCHWARTZ: The Executive Council. They authorize the referendum.

Do you have a copy of the Off-Shore Division by-laws? It is very plain.

MR. DANAS: Yes. With regard to the referendum information --

MR. SCHWARTZ: Let me explain it to you.

What happens there is a provision as to

how you amend those by-laws, and what happens is that certain propositions have to be drafted and submitted to the membership.

They are all in the form of amendments to the by-laws.

The Executive Council has the job of getting up those amendments and causing them to be ballotted upon.

MR. DANAS: I understand.

MR. SCHWARTZ: And then it becomes an official amendment of the by-laws and the Executive Council then acts in accordance with the by-laws.

MR. DANAS: With regard to the referendums that you stated that you would provide to us, I would like to ask you for the minutes of the Executive Council meetings which both authorized the referendum and later acted upon the referendum.

MR. SCHWARTZ: Sure.

MR. DANAS: Thank you.

Q Now, Captain, are there any other positions within the Off-Shore Division for which nominations are open during the month of June of 1974 other than those you just mentioned?

A I believe I mentioned them all, and the

Pilot Division, of course, they have their nominations the same month.

Q You mentioned nominations for the position of Atlantic Vice President?

A Yes, Port of New York. No, the Port of New York Agent. Atlantic Vice President is one job.

Everybody votes for him throughout the country.

Everybody votes throughout the country for ever elective job.

Q So the man who is elected New York Port Agent by all Off-Shore Division members automatically becomes vice president?

A Yes. The vice president, if a person wants -- vice president is part of the job of the New York Port Agent. The Gulf is part of the job of the Galveston Agent and San Francisco for the West Coast.

Q And those three vice presidents, as we dsicussed earlier, sit on the Executive Committee of the International, is that correct?

MR. SCHWARTZ: General Executive.

Q General Executive Committee?

A Board.

Q General Executive Board.

MR. SCHWARTZ: General Executive Board.

Q Are the three Off-Shore Division vice presidents that you just named the three top officers of the Off-Shore Division?

A No.

Q Who are those top officers?

A The top officers are the three International officers.

Q Well, with regard to the Off-Shore Division, what would their titles be?

A They are the Executive Officer -- the International President is the Executive Officer of the Off-Shore Division and the Secretary-Treasurer is the Finance Officer of the Off-Shore Division, and the Executive Vice President is the Executive Vice President of the Off-Shore Division.

Q Now, with regard to the three top officer positions of the Off-Shore Division, are nominations for those positions open during the month of June of 1974?

A No.

Q When are nominations for those positions held?

A At the convention.

Q Why are those nominations not held during June of 1974 along with the other officers of the Off-Shore Division?

A The constitution and by-laws don't call for it.

Q The constitution and by-laws of which organization?

A Of either or both, of the Off-Shore or the -- it constitutes the Off-Shore by-laws, the International President would be the Executive Officer.

MR. SCHWARTZ: And the International constitution says only the International Vice President shall be nominated.

Incidentally, the International constitution says ten days after.

Q So the constitution and by-laws of both the International and the Off-Shore Division provide that the three officers of the International, the President, Vice President and the Secretary-Treasurer automatically, by virtue of those positions, become

the three top officers, executive officer, assistant executive officer and financial officer of the Off-Shore Division, is that correct?

A That is true.

Q With regard to the election for International President, what is the scope of the membership allowed to vote for him?

A Everybody that belongs to the International organization.

Q That is the Off-Shore Division members?

A Everyone.

Q The Pilot Division members?

A That's right.

Q And what else? The Inland Division?

A Whatever Inland local or regions that might be, or if there is any local, Panama Canal local, two locals from the Canal, all the subordinate bodies for the three top International officers.

Q And by virtue of the vote of all members of the Union that you just described, the president, the International president, so chosen, then descends to become the president or the chief executive officer of the Off-Shore Division, is that

correct?

A He doesn't descend. When he's elected, he's elected to that office.

Q Which is a higher position within the Union structure, International President or Off-Shore Division Executive Officer.

A There is one position, it is a common position.

Q On paper in terms of the Union structure which one is a higher office.

A There isn't any such thing on paper.

Q Are you saying that there are not two separat officers?

A Absolutely.

Q I am not referring now to the person, to the individual, I am referring to the officers.

A It is the common office. If you are the International President you are the Executive Officer of the Off-Shore Division.

MR. SCHWARTZ: Is it really important to you which one is higher or lower or what? Does it really make any difference?

MR. DANAS: I am asking. He now holds those two positions.

Q Do you not?

A It is one position, it is not two. There are two positions and you are getting two --

Q Are the duties different as between your slot in the International -- as International President and your slot as Off-Shore Division Executive Officer?

A The duties for the International President as far as the Off-Shore goes, is identical; it is the same job.

Q Not as far as the Off-Shore goes. I am referring to your total scope of duties, are they the same?

A I don't understand your question.

Q When you act as International President, do you do anything in that capacity over and above or in addition to what you would do as Executive Officer of the Offshore Division?

A Both jobs are combined.

Q Do you ever take any action with regard to the Pilot Division as International President?

A Yes.

Q And do you ever take any action with regard to the Inland Division as International

President?

A Yes.

Q Now, it is clear, is it not, that you are not taking those actions as Off-Shore Division Executive Officer? Correct?

A No, it is not correct, because I don't divest myself as being Executive Officer of the Off-Shore Division when I do something for the Inland Division.

Q Let's go through it again. Is there any document which we can point to which outlines your duties as International President?

A Yes.

Q What is that document?

A The International Constitution.

Q And is there any document that encompasses or outlines your duties as Executive Officer of the Off-Shore Division?

A Yes.

Q Where is that?

A The by-laws of the Off-Shore Division.

Q And is it your testimony that the provisions of the International Constitution with regard to the president's duties and the provisions

of the Off-Shore Division by-laws with regard to the president's duties or the executive officer's duties are identical?

A I don't think it is an answerable question because the Inland is not a fully formed division.

And they have autonomy where they run their own affairs considerably more than the Off-Shore Division does.

So -- as far as the Pilot Division goes, I am the executive officer of the Pilot Division. It is a fully formed division.

One day we hope out of this mess that this Union was that it will be fully -- all divisions will be fully formed and it will have one person at the head of it whenever that might be.

Whenever it is a fully formed division of the Inland, I will become the executive officer of the Inland Division. Until that day is reached, they have their own autonomy and they do certain things, but they are responsible to the International Constitution which they can't be in violation of.

Q Is a fully formed division a union, a labor union in and of itself?

MR. SCHWARTZ: That calls for a legal conclusion.

MR. DANAS: All right.

Q Does the Off-Shore Division, to your knowledge, file any separate Labor Department forms?

A They file, my office with my name on them as the executive officer.

Q Of the Off-Shore Division?

A That's right. The Pilot Division does the same, but the Inland Division and the Panama Canal Pilots file their own with copies to my office.

Q Again, just to recap, we have the three International officers who automatically are Off-Shore Division -- the three top Off-Shore Division officers. We have the three Vice Presidents of the Off-Shore Division. We now have those six persons.

Are there any other persons who sit on the Executive Council?

MR. SCHWARTZ: The Executive Board.

Q The Executive Board.

A All of the port agents throughout the country.

MR. SCHWARTZ: Of the Executive Board, not the Executive Council.

A Oh, that would be the three top officers, the three vicepresidents, and the vice president in charge of the Pilot Division and all of the Executive Officers of the subordinate bodies.

Q The Inland Divisions?

A That's right.

MR. SCHWARTZ: Different locals?

A Yes.

Q How many members does that constitute of the Executive Board, approximately?

A Right now, 11, I believe.

MR. DANAS: Mr. Schwartz, just again so we understand this, is this Executive Board that we just discussed the Board or the group that acts with regard to the referendums that we referred to earlier?

MR. SCHWARTZ: No.

MR. DANAS: The other one is the Executive Council?

MR. SCHWARTZ: Write it down, otherwise it gets very confusing. It is the Off-Shore Division Executive Council.

You find that in the buff colored book that has the Offshore Division by-laws that we furnished you.

All right?

MR. DANAS: Yes.

MR. SCHWARTZ: The other one which is provided for in the blue book which is the International Constitution, is called the General Executive Board. It is confusing and one of the reasons it is confusing is that sometimes we ourselves use the names inaccurately.

We might say Executive Council. It is a difference and quite a substantial difference.

MR. DANAS: Now that I have written it down I hope I won't make the same mistake again.

MR. SCHWARTZ: It is hard if you don't write it down.

MR. DANAS: Of course if the members make the same mistake, I guess I am entitled to a few this morning.

MR. SCHWARTZ: Right.

Q What exactly are your duties, Captain, with regard to the Offshore Division?

A Well, the duties of President are spelled

out in the Division by-laws.

Give me one.

Q I can always refer to the by-laws, but just explain to me on a daily, weekly basis what are your duties with respect to the Offshore Division?

A Overall supervision of the Offshore Division.

Q Do you attend meetings of the Offshore Division Council?

MR. SCHWARTZ: Look at this.

(Handing.)

A Would it be better if I read this to you?

Q Well, I tell you, I don't think it is necessary for you to read your duties. I am asking you to briefly describe them. If you can't, then we can read it just as well off the record.

A It's overall supervision of the Union -- of the Offshore Division.

Q Do you handle the finances of the Offshore Division?

A I don't handle it. I have a finance officer and I check with him quite often.

Q Who is that?

A Robert Lowen, the financial officer. We also have a comptroller who does similar work.

Q Where is the Offshore Division Executive offices, or the central office for the Offshore Division?

A 39 Broadway.

Q The same place as the office of the International?

A Yes, my office.

Q Are there any other officers of the Offshore Division?

A We have got a general office on the West Coast, just outside of any port office in San Francisco, separate from a port office in San Francisco.

Q Are separate financial books and records kept for the International Union and for the Offshore Division?

A Yes.

Q And there are separate funds, I gather, for both?

A Yes, that's right.

Q Segregated accounts?

A Yes.

Q And do you or Captain Lowen administer both of those sets of accounts?

A Yes.

Q Do you as President of the International have an expense account?

A Yes.

Q Do you as President of the Offshore Division have a separate expense account?

MR. SCHWARTZ: He's not the President of the Offshore Division.

Q Executive Officer of the Offshore Division.

A If I have expenses chargeable to the Offshore Division I charge it to the Offshore Division.

Q So there is an expense account for your use in the Offshore Division?

A It is charged to the Offshore Division, yes.

Q Would the same thing be true for Captain Lowen?

A Yes.

Q And for Captain Caldwell?

A Yes.

Q Are there any other persons besides the three International officers who would have access to expense accounts of both the International and the Offshore Division?

A If I would assign somebody to work on something that happened to be an Inland Pilot or happened to be a Pilot Division to do something for the Offshore the expenses would be charged to the Offshore Division.

Q I am referring to any persons who on their own, without being assigned by one of you three, could have access to both?

A No.

MR. SCHWARTZ: Off the record.

(Discussion off the record.)

Q Captain, getting back to Exhibit D that we marked earlier this morning and the decision of Judge Croake with regard to that Exhibit, in the course of the litigation before Judge Croake and prior to his decision, you submitted an affidavit to the Judge, and in that affidavit you stated on page 5 that a special election supplement of the Masters, Mates and Pilots Magazine would be

mailed out subsequent to the date of your affidavit, which I believe was in September of 1971.

Was such special election supplement in fact mailed out?

A I would have to check the record. I assume it was.

MR. SCHWARTZ: Which one was that? What document was that?

I don't recollect what it is.

MR. DANAS: Just for the record, I am reading from Captain O'Callaghan's affidavit submitted to Judge Croake, and at the lower portion of page 5 he refers to a special election supplement.

MR. SCHWARTZ: Do you have a copy of that?

MR. DANAS: We can make a copy of it.

MR. SCHWARTZ: Yes. It should be attached to the copy of the request for admissions, isn't it?

MR. DANAS: In any event, let me hand it to you now to save time.

MR. SCHWARTZ: Yes, that is the spread sheets that have the candidates on it. Isn't that

what we called the special election supplements?

MR. DANAS: I don't know, I am trying to find out.

MR. SCHWARTZ: If it is what I think it is, it is the big sheet containing the names and what --

THE WITNESS: And the candidates and their statements.

MR. DANAS: You are referring to the newspaper supplements that --

MR. SCHWARTZ: No. Wait a minute.

MR. DANAS: It looks like the New York Times.

MR. SCHWARTZ: Yes.

I think that is it, is that right?

THE WITNESS: Yes.

MR. SCHWARTZ: I think that is it. If you have a copy, let us take a look.

THE WITNESS: No, that wouldn't be it.

MR. SCHWARTZ: No, that's not it.

THE WITNESS: It's on glossy white paper.

Q You referred earlier in your deposition

to the national slate of candidates -- yourself, Captain Lowen and Captain Caldwell.

Were there any other persons, any other candidates with regard to the 1971 election who would be included, or who you would include on your slate?

A When?

Q In 1971, with regard to the election at issue.

A If memory serves me correctly, all the incumbents were on the International slate, they all ran together.

Q When you say incumbents, in what positions?

A In whatever position they had. I don't think there is any changes.

Q Incumbent port agents in Houston was on your slate.

A That's right.

Q Were there any incumbents in 1971 that you specifically can recall who were not for one reason or another included within your slate?

A I don't believe so.

Q With regard to this slate of incumbents

you just described, did you have occasion in the pre-election and campaign period in 1971 to discuss with any of these incumbents the distribution or dissemination of campaign literature?

A Oh, unquestionably I did. Certainly I discussed it with the people on the slate.

Q What was the nature of those discussions?

A Oh, the nature was get out and hustle and get votes and get elected.

Q Did you discuss with those incumbents anything with regard to the dissemination of campaign literature on your behalf?

A I don't recall any specific discussion as far as I was concerned. I always talked about the whole slate. I wanted everybody on my slate to get elected as much to get myself elected.

Q Well, were you aware during that period that certain of these incumbents at the local levels were in fact disseminating literature which would benefit you as a candidate for International President?

A Everybody was disseminating literature. I knew that people -- everybody who was running for office was disseminating literature.

Q When a local candidate disseminated campaign literature which had the effect of benefiting your candidacy, did you contribute financially in any way to the dissemination of such literature?

A I collected from them. I don't recall if I gave them.

Q What did you collect from them for?

A To send out the large mailings. It is a pretty expensive thing to send out the mailings through the AAA, you know. And to the best of my recollection we only sent out one and I didn't bear the total expense myself. I think the stamps are $800 alone.

Q In what manner did you collect the proportionate share of the incumbent candidates?

A I don't recall right now, but I think before the election I told them all -- suggested they all send in a hundred or two a piece.

Q How many incumbents approximately are we talking about?

A The agents and the assistant port agents and the port --

Q Approximately how many would that be?

A I can approximate them for you.

Q A rough figure, thirty, forty?

A Around forty.

Q So you were seeking between 40 and 80,000 dollars.

A Two hundred. Let's knock it off here.

MR. DANAS: I am off by a lot.

MR. SCHWARTZ: Four, five, $6,000.

MR. DANAS: Four to 6,000. I had an extra zero.

Q When you say you suggested to these incumbents to contribute, in what manner? Was that at a meeting you made that suggestion?

A No, when I ran into them on various occasions, it wasn't at a meeting.

Q When you ran into them where?

A After a meeting or any time I would run into them. It is not hard to pass the word. If I pass the word to the top fellow in the port, dropped him a line, I would expect him to get the money from the people in his port and send it up.

Q Did you physically do any campaigning? Did you make speeches?

A Very little.

Q Did you visit ships?

A No.

Q Union halls, local union halls?

A No.

Q No?

A No. I think I -- a couple of times that I was on union business at the Gulf station -- Union business, I didn't attend any meetings with any hall. I may have attended a metting in New Orleans.

I went down to New Orleans once on something and there happened to be a meeting there, but that is the only place I went to a meeting.

Q During the months of August, September, October and November of 1971, where were you living and which office were you working out of, if any?

A New York. I spent a lot of time in Baltimore at the school at that time. I was preparing, get the school, meetings pertaining to the school and I was living in Virginia, my home, but New York was my base of operations.

Q I asked you the last time to check your diary with regard to the amount of time that you

spent in New York during those months in 1971. Have you done so?

A No.

MR. SCHWARTZ: We will get it for you.

Doyou want to know the proportionate time?

MR. DANAS: Yes.

Q You also mentioned the name of someone who worked in the International office, Camisa.

A Yes.

Q What exactly was his position with the International?

A Well, he was a man Friday. He did everything, assistant to me, and he would do just about everything that there was to do on a staff level.

Q Was he hired by you?

A Yes.

Q What is his current position?

A I don't know.

Q He's no longer with the Union?

A No.

MR. SCHWARTZ: Are you trying to -- we are not saying we don't know where you can find

him.

MR. DANAS: I haven't gotten to that yet.

MR. SCHWARTZ: All right.

Q When did he leave the employ of the International?

A '72 -- about a year and a half ago, I guess.

MR. SCHWARTZ: About a year and a half?

A About a year and a half, two years.

Q What were the circumstances of that severing of relations?

A He resigned. I believe he went back to work for the people he was working for before he came to work with the Union.

Q Do you know his present whereabouts?

A He works for Martin Siegel.

Q Martin Siegel?

A Yes.

MR. SCHWARTZ: Martin Siegel is the largest pension and welfare plan consultants in the country. They have an office here in New York. He's employed here in New York and I think he's one

of their vice presidents now.

MR. DANAS: S-i-e-g-e-l?

MR. SCHWARTZ: S-e-g-a-l.

And their number is JU 6-5600.

Q Does Martin Segal do pension work for the International organization, Masters, Mates and Pilots?

A They are actuaries and they are the actuaries for the plan. They are the actuaries for practically every maritime plan in existence, I believe.

They are a tremendously large outfit.

Q Were theyactuaries for the International prior to Mr. Camisa joining them?

A The International doesn't have any actuaries.

It's the plan.

Q Were they the actuaries of the plan prior to Mr. Camisa joining their staff?

A Yes.

Q With regard to the campaign literature of the incumbents at the local level, was any of that literature submitted to you for your approval, suggestions?

A No. I saw several of them when they were sent out.

Q Did you send out any guidelines or send out any thoughts with regard to what that campaign literature should include?

A They did it all. They are old pros.

Q Was Moe Weinstein an incumbent in 1971?

A Yes.

Q Was he running for re-election in 1971?

A Yes, he was.

Q For what position?

A Port agent, Baltimore.

Q Did you confer with him with regard to campaign literature?

A I undoubtedly spoke to Moe.

MR. SCHWARTZ: How long have you known him?

THE WITNESS: I have only known Moe for 40 years, thereabouts.

Q Was he ever an International officer of the Union?

A Yes.

Q What position did he hold?

A Oh, years ago he was an International

Vice President.

When they had many. I think they used to have about 15.

MR. SCHWARTZ: 13.

May we stop for a few minutes?

MR. DANAS: Would you want to break for lunch now and then come back at 1:15?

Is that convenient to you?

MR. SCHWARTZ: Let's make it 1:30.

MR. DANAS: All right.

(Luncheon recess.)

AFTERNOON SESSION

1:15 p.m.

xx THOMAS F. O'CALLAGHAN, resumed.

xx EXAMINATION CONTINUED

BY MR. DANAS:

Q Captain, earlier today we discussed the General Executive Board of the International Organization and you described the members of that Board.

Now, would you describe the manner of the voting on that Board?

A I believe the vote was 401, but I would have to look it up. That is voting per capita.

Q You have one vote on the Board?

A No, I have what other members are there divided by the total number of votes.

MR. SCHWARTZ: Let me just say this -- maybe we will save about a half hour of questioning -- you asked this any number of times, and I thought the record was clear.

As soon as the division is fully formed the International officials who then assume certain duties with regard to the fully formed division vote a proportionate share along with the vice president

from that division of the per capita. So that, for example, with regard to the Offshore Division, the three International officials by virtue of their position in the Offshore Division Executive Council -- rather, by virtue of their position with the Offshore Division, would vote in combination half of the per capita vote of the Offshore Division. Right?

THE WITNESS: Yes.

MR. SCHWARTZ: And the other three Offshore Division vice presidents who act as members of the General Executive Board, vote the other half.

Similarly when the Pilots Division is fully formed there is one vice president, the three International officials and the one vice president who splut the per capita of the Pilots Division.

That means the vote in addition to the vote they have from the Offshore Division, they will vote three quarters in combination of the per capita of the Pilot's Division.

MR. DANAS: The three Executive officers will vote three quarters?

MR. SCHWARTZ: Yes.

MR. DANAS: What about with regard to the Inland Division?

MR. SCHWARTZ: As I recall it, since there is no one there, it is not a fully formed division, they do their own and they have no vote.

MR. DANAS: I thought you said before they sit on the General Executive Board.

MR. SCHWARTZ: They do, but the executive office of each of these locals vote per capita.

MR. DANAS: With regard to the general vote of the Board, you take the Offshore Division's vote split up as you just mentioned, what percentage of the Board vote does the Offshore Division constitute?

MR. SCHWARTZ: I don't know offhand. It would depend on the relative number of members. I suppose the Offshore Division is the majority certainly of the members.

How many men are there in the Offshore Division?

THE WITNESS: 2,000 and 2,000.

MR. SCHWARTZ: 6,000, and probably the combination of the others, about 3500 or 3,000.

MR. YOUNG: About --

MR. DANAS: What percentage would that be, approximately?

MR. SCHWARTZ: 60 per cent, 70 per cent. The Offshore Division, a majority of the men.

MR. DANAS: If the Offshore Division has 70 per cent of the vote of the Board, then the three International Officers would have 35 per cent of the vote of the Board?

MR. SCHWARTZ: Correct. But then they have added on to that any other fully formed division.

MR. DANAS: Is the 35 per cent vote just mentioned in addition to their vote as International officers?

MR. SCHWARTZ: No, it is not in addition to their vote as International officers, because the vote of International officers per se is nothing on the Board because the vote comes from the Division or from the local.

They have no separate vote other than that.

MR. DANAS: Captain O'Callaghan, Captain Lowen and Captain Caldwell, as of now vote

only once and that is half of the Offshore Division?

MR. SCHWARTZ: And vote three quarters of the Pilot's Division.

MR. DANAS: Beyond that they don't vote as straight International Officers?

MR. SCHWARTZ: No.

MR. YOUNG: Are they entitled to vote as International officers on the General Executive Board?

MR. SCHWARTZ: No, I think not. That is my general understanding. The chairman usually has the right to break a tie, but the likelihood of a tie when you are voting, you know, 6,000, 841 and 6,00, 332, the likelihood of a tie -- if you had it once in two hundred years it would be remarkable.

They don't vote on the General Executive Board by virtue of their own position.

Q Regarding the Offshore Division Executive Council meetings, you attend those as Executive Officer of the Offshore Division?

A Yes.

Q How is the voting broken down at those

meetings?

MR. SCHWARTZ: Everybody votes once. Everybody has one vote. I think we went through it last time and I showed you the proportion --

MR. DANAS: We didn't go through it.

MR. SCHWARTZ: No? Take a look -- did I give you the Offshore Division?

THE WITNESS: I got it.

MR. SCHWARTZ: Yes. Take a look at the Offshore Division and it is under article 11, Offshore Division Executive Council. There are some 20 odd people on that council as indicated by the appropriate section and everybody has one vote.

MR. DANAS: Article 11 of the by-laws of the Offshore Division you just referred to?

MR. SCHWARTZ: Nine.

MR. DANAS: Article 9 of the Offshore Division by-laws indicate that the vice president of the Atlantic Division shall get one vote and it also indicates that the port agent of New York shall get one vote.

MR. SCHWARTZ: It is the same. They don't get two votes. It is a combination thing. This was set up with the possibility you might have

two such people.

However, as the result of a recent referendum we avoided that. It is definite now it is only going to be one job. This way they get one vote.

MR. DANAS: Is that recent referendum one that will be provided to us?

MR. SCHWARTZ: Yes. You see, as it stood now there was a question about the requirement of actually electing the port agent separately as one job and then having another job as vice president, but that was clarified in the recent referendum because it just wasn't necessary to have two jobs. But they have one vote.

MR. YOUNG: Does it say here there is only one vote?

MR. SCHWARTZ: No, it doesn't say it expressly. They don't get two votes.

MR. DANAS: I gather further where it says the port agent of Boston gets one vote and the port agent of Providence gets one vote, it is now just one vote in this New England port?

MR. SCHWARTZ: Right.

MR. DANAS: Would the same changes be

made to Philadelphia, Baltimore, Norfolk, et cetera?

MR. SCHWARTZ: They all haven't been changed.

THE WITNESS: Only Philadelphia.

MR. SCHWARTZ: Only Philadelphia.

MR. DANAS: Philadelphia is merged into Baltimore.

MR. SCHWARTZ: Right.

MR. DANAS: And there is only one vote between Baltimore and Philadelphia now?

MR.SCHWARTZ: Yes.

MR. DANAS: So even though article 9 is misleading, you are representing that there is only one vote per man?

MR. SCHWARTZ: I don't know whether article 9 is misleading or not.

MR. DANAS: It does indicate. I think you will agree the port agent of New York --

MR. SCHWARTZ: I won't argue language with you. I will agree it doesn't expressly so state and that it might be confusing, but representing the way it actually would, everybody gets one vote.

Q Captain, with regard to these vice presidents of the Offshore Division, Atlantic, Gulf and

Pacific, in addition to their functions on the Offshore Division Council and in addition to their functions on the Executive Board of the International, do they have any other functions within the Union structure at any level?

A Yes, if I got word to pass generally anything about the contract -- say, just for example, a change in the contract, I would call the vice president of each coast and tell them pass the word to the other ports.

And if I want to know something about a port, I would ask the vice president about it.

Q How often are you in contact with the vice president?

A It depends on what the business is. Sometimes a couple of weeks and sometimes once a month and sometimes twice a week. There is no set thing. If there is an important message I want to pass out to all the agents that we will do through the vice president and we have got the telex, too.

Q If we can characterize the functions that you just described as being somewhat of a conduit of information between the divisions and the

International office, which functions, i.e., conduit or sitting on these two boards are more important with regard to a vice president of, let's say the Atlantic Division?

MR. SCHWARTZ: I am not sure I understand that myself.

You call it a conduit. That is not what he called it.

MR. DANAS: My understanding, if I am not mistaken, is that these vice presidents are called upon by you to provide you certain information with regard to their area and to transmit certain information from you to persons in their area.

Q Is that correct?

A Yes, if there is a problem in the port, it doesn't come to me, it goes to the vice president of the area to handle.

If he can't handle it, then he gets ahold of me, any port in this area. Shipping or any trouble whatever it might be, he gets in touch with me.

Q Are there any guidelines, either written or practice with regard to the type of matters

the vice president would refer to you?

A Just anything he couldn't handle.

Q Anything he feels he can handle, he handles?

A Yes.

Q Is that carte blanche?

A Trade union rules, it is spelled out by your agreement, constitution and by-laws. Shipping is one of the main things, to keep the ships sailing, to keep them manned. And it is his duty to see there aren't any unnecessary holdups of the ships and to see the contract is enforced.

Q Do the area vice presidents have any control over Offshore Division funds?

A There is funds in each port -- you can find this from our accounts -- there are bank accounts in each port and they make out the checks, they pay the people in the port, they transmit-- they transmit all dues monies to the International and in turn the International sess that certain monies are kept in the bank that they can pay the expenses of the port.

Q The International allocates monies back to the ports?

A Yes.

Q Earmarked to certain uses.

A Well, they -- a certain amount is kept in each port depending upon the size of the port and the number of people employed.

Q And that is decided upon by the International?

A It is decided upon by good bookkeeping practices.

Q By bookkeepers at the International offices?

A No, I said by good bookkeeping practices. The auditor -- we have a certified public auditor who looks into all of this and --

Q But he's employed by the International, is he not?

A The International, yes.

Q So that he looks into the situation and then tells the International officers how much money should be allocated to each port area?

A Yes.

MR. SCHWARTZ: He has a bad habit of recharacterizing something. If he isn't doing it correctly just say no and tell him how it actually

works.

Q Did I characterize it correctly? And if not, where did I miss?

A Well, certain remarks -- I think the amount is enough money to keep a port running for three weeks on a budget system. That amount of money is kept in the bank in each port.

MR. SCHWARTZ: What is the money to be paid for?

THE WITNESS: Wages and current expenses.

Q When the auditor reaches a decision as to what he thinks is necessary to keep a port running for three weeks, does he have to then transmit it to one of the three International officers, or does he just write out the check and send it down himself?

A The comptroller keeps -- the amount in each port is set.

Now, what it is I couldn't -- it varies with the port. The comptroller, through his contacts with the banks and the various ports, keeps it at a certain level.

MR. SCHWARTZ: Their wages don't vary from week to week any more than yours do. The

secretaries, the rent, all set by the by-laws.

Q Who is in control, Mr. Seidman?

A Yes.

Q He's located at 39 Broadway, the International office?

A That's right.

Q What about the auditor, who is that?

A He's with a firm in Philadelphia. His name is Robert Weiss and he's with a large firm.

Q Certified public accounting firm?

A Yes. And Weiss himself is a CPA.

Q Captain, back in the August-September, '71 period, did you have a campaign manager handling your re-election efforts?

A No.

Q Were there any persons who acted on your behalf?

A No.

Q With regard to preparation of campaign literature?

A No.

Q With regard to that at least one mailing that you referred to earlier, who wrote the text of that document?

A I did.

Q In connection with anyone else?

A No, I might have got it okayed by Lowen or Caldwell before I sent it out, but they would be the only two. I don't recall exactly. I might have asked them for drafts and then gone in to -- I know the final thing was mine. I didn't get any professional help or anything of that sort.

Q How about Mr. Camisa, did he help you at all?

A No.

Q With regard to campaign literature?

A No, he didn't.

Q Did he assist you at all with the campaign in any capacity?

A No, none whatsoever.

Q Did you consult with Mr. Camisa with regard to your campaign?

A No.

Q Speeches, appearances?

A No, I didn't make any speeches.

Q Appearances?

A No.

Q Attendances at meetings?

A No.

MR. SCHWARTZ: I have a tough enough time getting him to show me anything from a legal point of view, so you can imagine trying to get somebody to write it for him.

Q In November or December of 1971, did you attend a meeting in Mobile, Alabama?

A What kind of a meeting?

Q A Union meeting, I guess, I would imagine of the port, of the International?

A I would say definitely not. I absolutely do not recall a Union meeting of the Masters, Mates and Pilots.

Q What about any of its local divisions?

A I was down at an ILA meeting something that year, but I don't know -- I would have to look it up, but it had nothing to do with campaigning.

Q Maybe this would refresh your recollection somewhat.

Does the name Francis E. Kaiser mean anything to you?

A I know Kaiser; he's our agent in Mobile right now.

Q Was he the agent in Mobile back in

December of 1971?

MR. SCHWARTZ: November or December?

Q November or December.

A No, I think Mitchell was still an officer. Let me see.

No, I guess Kaiser was. He was the agent.

Q Do you recall attending a meeting in Mobile in or about November or December of 1971 at which Mr. Kaiser was present?

A No. ILA Executive Board meeting, but I don't know what month it was, and I don't recall seeing Kaiser there. He may have possibly known I was in town and looked me up at the hotel I stayed at, but I don't recall -- I didn't go to any Union meeting that I can recall. I am 99 per cent sure that I didn't go.

Q If it was an ILA Executive meeting would Mr. Kaiser have been present at that as port agent of Mobile?

A I could have seen him there.

Q But would he have been present at the meeting?

A No.

Q What hotel were you staying at in Mobile?

A I don't know. I don't remember that.

Q Do you have a diary which would reflect a meeting -- a visit to Mobile?

A Yes.

Q Would you check that diary?

A Yes.

Q The dates that you were in Mobile in November and December of '71?

A Yes.

Q The hotel you stayed at?

A Yes.

Q The meetings that you attended?

A Yes.

MR. SCHWARTZ: We will be glad to do that for you.

MR. DANAS: Thank you.

MR. SCHWARTZ: Incidentally, it would help a good deal if when you get the deposition if as soon as you got it you sent it to us because it would help us in collecting these things. We made some notes, but especially now it is compltely. There is no tactic involved.

MR. DANAS: We will certainly forward

it as soon as it is completed.

MR. DANAS: I would like to have marked as Exhibit E for identification, this document which was previously marked EE at another deposition.

We will just remark it, I guess, Plaintiff's Exhibit E for identification.

MR. SCHWARTZ: What is it? Do you want to read off the headlines?

MR. DANAS: It is entitled "All Constitutional Amendments and Resolutions of the 60th Convention Ratified. Affiliation of IOMM&P of the International Marine Division of the ILA (AFL-CIO) Affirmed."

"Affirmed" is underlined.

It is a document dated November 26, 1971.

MR. SCHWARTZ: Let me see that.

MR. DANAS: Would you mark this as Exhibit E for identification.

xx (Document entitled "All Constitutional Amendments and Resolutions of the 60th Convention Ratified. Affiliation of IOMM&P of the International Marine Division of the ILA (AFL-CIO Affirmed," marked Plaintiff's

Exhibit E for identification.)

Q Captain, you and Mr. Schwartz just had an opportunity to examine this document.

Do you recognize the document?

A Yes.

Q Can you tell me by whom it was written?

A If I remember correctly, it was by myself and Gleason.

Q Who is Gleason, Teddy Gleason?

A Yes.

Q You and Teddy Gleason got together and wrote this?

A A good part of it there.

Q A good part of it?

A Yes.

Q Who wrote the rest of it?

A I believe the rest is just factual. I probably did it myself. I don't recall. It might have been Lowen, myself. I might even had Gleason sign. Possibly Larry Malloy might have gave a draft.

Malloy is Gleason's public relations man, so part was probably jointly signed. It was done at my office by myself. I don't recall who I

had assist me with it, but probably most of it was done by myself.

Q Was this document disseminated to the entire membership of the International Organization of Masters, Mates and Pilots?

A Yes, I believe it was.

Q Was it disseminated to the membership of the ILA?

A I don't know.

Q You don't know?

A No.

Q Did you ever know?

A No. I doubt that it was disseminated to the entire layout, but I don't know. I can find out from Gleason.

Q This was mailed to the membership of the Masters, Mates and Pilots on or after November 26, 1971, is that correct?

A The date is a matter of record, I can't tell you what date it was.

Q It is dated November 26.

A That doesn't mean it was sent out that date.

Q It would not have been sent out prior to

November 26.

A It could have been sent out a month after, though.

Q Right, but it wasn't before?

A No, I wouldn't -- I would grant that.

Q Would the Union records reflect when this document was mailed out to the Union membership?

A I am pretty sure we can find out.

Q Would you check the records?

A Yes.

Q And we will leave a space in the record and let us know when this was mailed to the membership?

A Yes.

Q Whose idea was it to prepare and disseminate Exhibit E?

A Probably mine.

Q What were your intentions with regard to the preparation and dissemination?

A Notify the membership of the balloting and also to let them know what President Gleason, the ILA view was, with regard to the two Unions

via close association and things like that, and his Union as the International President of the ILA.

Q You mentioned two subjects.

One subject was to inform the membership that the affiliation had been ratified, correct?

A Yes.

Q The second one, the second subject, I gather refers to the third page of the document, an eleven point pledge, is that correct?

A Eleven points that we brought up to the membership, yes.

You know, at that time all this godfather literature and everything else had been passed out against me and against the ILA, in the South, all types of literature, so I thought it only right to let the membership know that probably a lot of this literature that was so widely distributed to give it a bit of an answer.

Q This document, Exhibit E, was published and disseminated at Union expense, was it not?

A Yes, indeed. I know the godfather stuff -- now the godfather stuff, I am again the godfather the last couple of months. It is coming up again.

MR. SCHWARTZ: The same that you had before?

THE WITNESS: The same names.

Q You had eleven pledges here by yourself and Teddy Gleason.

Which one of you decided on these eleven pledges?

A We talked it over and came to a conclusion that that was what our aims were and wanted the membership to know.

Q These eleven pledges contain an assumption that you would be re-elected, do they not?

A No, indeed. I don't think they do.

Q Well, did you intend to accomplish these eleven points in the remaining month of your tenure?

A So long as I was president, they -- it would be my aim to.

Q I am asking you whether you intended to accomplish them in one month?

A All that I could, yes.

Q How would you characterize this document?

A Just information to the membership.

Q Information about what?

A As I pointed out before --

MR. SCHWARTZ: Off the record.

(Discussion off the record.)

MR. DANAS: Would you read the last question and answer?

(Question and answer read.)

A -- there was a lot of real scurrilous literature put out on all coasts about both me and the ILA while the voting was going on for affiliation, and I thought this would settle the membership a little bit on what the thoughts of myself and Mr. Gleason was.

Q So you felt justified in putting those thoughts to the membership?

A I thought it was necessary.

Q And, of course, it was done at Union expense?

A I beg your pardon?

Q It was done at Union expense?

MR. SCHWARTZ: He already said it was.

A Of course.

Q Was Exhibit E mailed to any members of the Union aboard ship?

A I would have to check that out. I imagine it was, but I won't say definitely it was.

Q What mailing was used in that regard?

A It probably would have been the mailing list that is used for the paper.

MR. SCHWARTZ: They have a number of questions about what a list on the ship means.

Can you explain how things get distributed by ship, how they are addressed?

THE WITNESS: If anything is sent to a ship by the mailing it is sent to the Master, no name, just Master SS so and so and to the company office.

Q Both?

A Pardon?

Q To both places?

A No, to the company office, shipped in care of the company office and they forward it.

Q Is that the same with regard to ballots?

A Pardon?

Q Do you use the same method with regard to ballots?

A No, we don't send the ballots that way. We send the ballot to the man's last known address.

MR. SCHWARTZ: If it is on board ship it is sent to the Master with several copies to the office. No one knows who is on what ship at any particular time throughout the entire fleet. You can find out if you have to who is on what ship. You know, you can call and ask and do things like that.

But there is no list of names of people on a particular ship. That just doesn't exist.

Q Does the Union maintain a list of the ships that its members, captains, sail upon?

A No.

Q How are the documents sent to the ship?

A Master SS John Lykes --

Q How do you know it is SS John Lykes?

A Well, we have a list of ships intermingled in the mailing lists along with members of Congress and everything else.

Probably members of Congress got this.

Q Is there a separate list of the names of the ships -- the names of the ships, not of the Masters, but of the names of the ships?

MR. SCHWARTZ: In other words, he wants to know if you know what the names of the

ships are that are on the contract?

A I would have to ask the Plan if you want to know that.

Q You would have to ask who?

A The Plan, our pension and welfare plan office. They receive the -- any contributions from the ship and the ship has to be running in order for them to get it. They get a list.

Q They get the names of the ships?

A Yes.

Q Could they then transmit the names of those ships to the International office?

A No, we don't have a list of all the active ships of any of the companies. We have the names of the companies, but we don't keep a list of their names. The Plan keeps that.

Q All right.

Now, when we have documents that you want to send out to the membership, you said that those documents are sent in care of Master of a ship?

A They are not sent to the membership that way. They are sent to the Master with three or four copies and we hope he passes it out.

MR. SCHWARTZ: Where do you send them?

THE WITNESS: To the company office, the home office of the company, and we hope that they forward it.

Q When you send them to the company office, do you have the names of the ships they are to be forwarded to or do you just tell the company send them to any ships.

A No, we just put down Master and whatever ship happens to be --

Q Where do you get the names of those ships in order to be able to tell the company send it to these ships?

A Well, there is a list of names from a mailing list -- I don't know when it was corrected last -- that the papers are all sent to the ships, too.

Q Where do you get the names of the ships?

A From the Plan office.

Q So the Plan office forwarded to your office the names of the ships upon which the membership sailed, correct?

A Yes.

Q And there is a separate list of those ships?

A The Plan office, sure --

Q Does your office maintain that?

A No, it is all intermingled with the total mailing list of the paper.

Q How often does the Plan update the names of the ships, make deletions and additions?

A I have got no idea.

Q When it does do such updating, to whom at the International office does it forward the information?

A I don't know if they forward it even.

MR. SCHWARTZ: If you would like to know how the newspaper and that kind of thing is mailed, we will tell you how the mailing list is set up. We will speak to the mailing service which is a separate mailing service that takes care of t[illegible]stribution of the newspaper, and you can inspect the list of everybody who gets the newspaper, because that is the way it is done.

Q You are now saying there is one mailing list containing names of individuals, right? Containing names of individuals?

A The individual -- the paper mailing list -- the individuals are on that, too. And it is

sent to the mailing service, the name of which I don't know now.

Q Captain, let's go back a little.

How many separate lists for mailing of documents are there?

And would you name which lists they are?

MR. SCHWARTZ: If you know.

A I think I can tell him what he wants to know.

If you want to know are we using a separate list for ballots and a separate list for the newspaper, yes.

When the ballot goes --

Q I want to know at this point if there are any lists besides the newspaper list and the ballot list?

A No.

Q There are two lists?

A Yes.

Q What names and addresses or types of names and addresses are on the newspaper list?

A A multitude of names. There is ships, there are seamen's clubs, members of Congress, anyone who says they want the paper.

MR. SCHWARTZ: Lawyers, libraries, schools.

A Coast Guard?

Q What about the ballot list?

A We don't keep a ballot list. We only have a ballot list when there is a ballot going out and the secretary-treasurer draws up a list from the membership rolls or from the list that he gets from the subordinate locals, makes it up and certifies it and sends it up to the agency that handles the voting.

Q In a non-election year, I gather there is only one list and that is the newspaper list?

A That's right.

Q And that list is used for the newspaper and for what else, if anything?

A Any publicity we use it. Any form of publicity.

Q What about a letter from you to the members, do you use the newspaper list?

A Yes.

Q Congressmen letters from you to your members?

A They very often do.

Q Libraries do?

A Yes, they did at that time. A whole lot were sent back. At the time we are talking about that was used at that time.

Q The newspaper list?

A Yes.

Q Non-segregated with regard to whoever might --

A I don't know how. You would have to find out from the mailing service if there is segregation.

I don'tknow. I don't believe there is.

Q So far as you know, every letter that is sent out from you to the membership is received by anybody and everybody on the newspaper list?

A If it goes to the -- and I believe these went to the -- except for theone that I sent out through the AAA, that was used by -- it was sent out by our mailing service.

Q That was your ballot list?

A No, no, the mailing service list; this sort of stuff here was sent out by the mailing service.

Q In 1971, what mailing service were you

using?

A I don't know. I don't know which one; if we changed it, the same one, or who it was.

Q What mailing service are you using now?

A I don't know the name of it.

Q Who knows?

A My publicity man.

MR. SCHWARTZ: I will be glad to get it for you.

Q Who is your publicity man?

A Roy Nash right now.

Q And who was your publicity man in '71?

A A fellow named Murray Weiss.

Q Is that not the CPA from Philadelphia?

A That is Bob Weiss, no relative.

Q In 1971, when the campaign literature that you referred to before --

MR. SCHWARTZ: His campaign literature.

Q Your campaign literature. When that was mailed out, by whom was it mailed?

A The AAA.

Q What list would the AAA use?

A The lists that were sent out to members in good standing.

Q The ballot list?

A That's right, the ballot list. It was sent by the International to them.

Q What about Exhibit E, the eleven pledges, who sent that out?

A My office sent it out.

Q And what list was used for that?

A To the best of my knowledge, the mailing list, the only thing we ever used.

MR. SCHWARTZ: Newspaper list?

THE WITNESS: The newspaper list -- the newspaper mailing list.

Q The Union has a mailing service, correct?

A Yes.

Q The name of which you don't know now but you will find out. And the mailing service uses the newspaper lists which were discussed.

Does your office ever send out documents directly without sending it over to the mailing list company?

A No. Unless it is the individual every-day mail, yes.

Q That is what I mean.

A The individual letters, yes; no mailing.

Q What about a letter from you to all members?

A It would go to the mailing --

Q In every case?

A Yes.

Q What about around election time?

A What do you mean "what about election time"? If it is Union business it would go right through the mailing service, yes.

I won't send any campaign literature out, if that's what you are talking about, through the mailing service.

Q What about -- just to be clear, Exhibit E was sent out by who?

A Let me see Exhibit E.

Q The eleven pledges.

A By the International office at Union expense.

Q Using a list of members?

A Using the mailing service.

Q Back around August, September, October 1971, November, there was a requirement, was there not, that any member in any port could inspect the Union's mailing list if he would come to New York

and inspect it here?

MR. SCHWARTZ: Excuse me.

I object to the form of the question.

Would you read the question back?

(Question read.)

MR. SCHWARTZ: I think what you mean if a member wanted to inspect the list, the only place he could inspect it was in New York, is that what you mean?

MR. DANAS: That's what I thought I said, yes.

MR. SCHWARTZ: Not quite.

Q Is that correct?

A The only place you could inspect the list was in the AAA in New York.

Q If you were to come to New York and go up to the AAA, was he allowed to keep the list?

A No, I don't believe -- that is not part of the requirement for a person to keep the list, no.

Q The requirement of what?

A Of anything.

Q So he could look at the list at the AAA?

A Inspect the list all he wants.

Q How could he make use of that list for campaign purposes?

A By paying the AAA to mail it out for him the same as I did.

Q Now, the AAA had a list of dues-paying members, correct?

A Yes, all dues-paying members in good standing.

Q But their list was not the newspaper list, correct?

A Correct.

Q Their list does not include libraries and congressmen and ships, correct?

A That's correct. Libraries and congressmen they weren't voting.

MR. SCHWARTZ: We are not on trial. It is all clear. We appreciate this, but this is hardly the place for it.

Q Well, if a candidate back in 1971 wanted to mail literature to a ship addressed "Master SS John Jones," was he able to do that?

A He certainly could.

Q How?

A Ask the company for the ships they got.

Q Ask what companies?

A Ask the Plan for the ships that are under contract.

MR. SCHWARTZ: Go over to the Seaman's Institute, look at the maritime register.

A Get the ABS registry of ships, American ships, look for Master so and so and they know where the company was, get to the company office.

Q Let's assume you went to these various sources and did have the names of ships, as you understood the rules and regulations of the election back in 1971, could this member then have mailed his stuff out, this campaign literature out directly to ships by himself?

A Surely. No one would stop him if he had the postage.

Q Wasn't there a requirement that all mailing of campaign literature goes through the AAA?

A No.

Q There was not?

A No. H could use it if he wanted to. If he didn't you could use your own, do it any way you want.

Q You mean, if a member made an individual mailing and then he went to the AAA, he could still inspect the list?

A He could inspect the list, sure, he could.

MR. SCHWARTZ: A lot of people make collective mailings, too. Just like he could make as many mailings up at the AAA as he wanted.

He could make more than one mailing.

Q To your knowledge, did any candidates in 1971 mail campaign literature directly to ships?

A I don't know. Probably any number of people that knew individuals on ships probably.

Q We are talking about a general mailing to ships?

A I don't know.

Q Did you yourself?

A No, I didn't. I sent it through the AAA.

Q But not Exhibit E, the eleven pledges?

A That is not campaign literature.

MR. SCHWARTZ: As a matter of fact, I think Judge Croake agreed with that, didn't he?

MR. DANAS: With what?

MR. SCHWARTZ: That --

Q What about the document Exhibit D that Judge Croake did say was campaign literature?

A Yes.

MR. SCHWARTZ: We will concede that it was sent to everybody.

MR. DANAS: Ships?

MR. SCHWARTZ: Everybody.

Q At whose direction did the AAA inform candidates that the mailing list must be inspected at their offices here in New York?

A I don't think there is anyone that did. They did that on their own. They are experts on any election and I am sure the balloting committee went over the entire rules with them.

Q You never told anyone at the AAA that the inspection must be here in New York.

A I never told anyone at the AAA at any time about anything to do with the election.

I never attended a counting or anything else. I had nothing to do with the AAA whatsoever.

Q How about Captain Lowen?

A Captain Lowen -- his job I am sure, was

in contact with the AAA on certain things he was required to be in contact with them on.

Q How about Kenney Camisa?

A I imagine while he was working with the ballot committee he, too, probably contacted them for the ballot committee.

Q What was his work with the ballot committee? What was he doing there?

A Well, since I last talked to you I looked over the various diaries that I got and I know that at that time there was a long period of time that Lowen was out of town and Camisa was pinch-hitting for him in the office and he was working with the ballot committee.

Q In what capacity?

A Assistant. The ballot committee -- that particular ballot committee, they were experts on getting the ballots out, seeing the thing was done according to the constitution and with the AAA.

And Camisa assisted with everything. They don't know where the various things are and he was just assisting them generally in getting the ballots prepared and laid out.

Q Is Mr. Camisa an expert in this regard?

A I wouldn't say he's an expert, but he's a pretty handy office man no matter what job you put him on.

Q Does the Union constitution or by-laws provide for the International office to provide assistance of this type to the International Ballot Committee?

A It is just good common sense that you do it.

Q I am asking you whether it is provided for in the constitution or by-laws?

MR. SCHWARTZ: I think there is something in there. If you stop trying to make something nefarious about it and think about it a minute, you will realize you couldn't do it any other way.

Let me just take a look.

MR. DANAS: While you are looking, Mr. Schwartz, I just want to step outside for a moment.

I will be right back.

MR. SCHWARTZ: That's all right.

We won't continue without you.

(Pause.)

MR. SCHWARTZ: I don't see it in this

constitution.

I know somewhere in the constitution there is a general statement that the International office shall assist the Ballot Committee in carrying out their functions.

It doesn't have anything specifically in it that I see offhand.

MR. DANAS: It is true, is it not, Mr. Schwartz, that the assistant referred to in prior constitutions had to do with the mailing list being provided to the Ballot Committee?

MR. SCHWARTZ: No. Again, it is obvious that you have never been around when a ballot gets put together or a committee functions, but these are men that come in from out of town and there is a substantial amount of accounting work that has to be done and there is a substantial amount of arrangements and instructions and things of that sort.

These men are seamen, they are not professional ballot experts.

So you have somebody who is well educated and who has degrees to help. That is the way it is done. They have to approve it, have to see it,

have to explain it to them as to why it is correct and that is the way it is done.

You have even more business with people --

MR. DANAS: By the way, at this point can we stipulate that as of the time that the Union mailed out Captain Sheldon's campaign literature pursuant to what we believe to be the court order of Judge Croake that as of the time of mailing approximately three to four thousand ballots had already been returned marked in and cast by the Union membership?

MR. SCHWARTZ: I would say that sounds about right, but rather than stipulate, let me check.

MR. DANAS: Would you check your records and see if you disagree with that?

MR. SCHWARTZ: Yes. I don't know whether we had actual accountants at that time but I would be surprised if close to half had been cast. I am just not sure. how we tallied it.

MR. DANAS: Also, since I am quite sure the Captain doesn't have the dates on his fingertips, I would like to know what date the votes for the ILA affiliation were counted and on

what date this Exhibit E, the 11 pledges document was mailed out.

MR. SCHWARTZ: Okay.

Q Did you personally, Captain, ever attend any meetings at which were present either Mrs. Carlson or Mr. Tannenbaum of the AAA?

A I don't recall any meeting whatsoever. Are you talking about -- what kind of meetings are you talking about? What kind of meetings are we talking about, Ballot Committee meetings or what?

Q Any kind of meetings.

A I have to church meetings, I don't know.

Q With regard to the election?

A No, not to my knowledge do I ever recall attending a meeting with any representative of the AAA.

Q Do you recall picking up a phone and talking to either of them?

A I could have asked about the election, how it was coming along, what the progress was at any given time, but I don't recall. It was no set thing.

My contact with them was minimal.

Q Do you recall ever picking up the phone and speaking with either of those two persons in a connection beside asking them questions? Did you ever tell them anything?

A I don't believe so.

Q Mr. Camisa did attend meetings of the International Ballot Committee, did he not?

A Yes, he assisted them.

Q Did you ever discuss with him at the International office the substance of those meetings?

A No.

Q Never once?

A I don't recall other than the fact to get the ballot out and get going. What the progress was I might have asked him, but with regard to anything else, I didn't.

Q You did inquire as to the progress?

A Getting it out "What are you doing."

Q And what was going to happen and when?

A No, I didn't ask him what was going to happen and when. I wanted to ask him when the ballot was going out.

Q You knew when the ballot would be sent

out?

A No, I didn't, because there were various requirements to getting the paper together.

Q All right, look, it took time.

A That's right, yes.

Q But he did tell you when it would be sent out?

A No, he didn't know. I don't recall his telling me when it was going to be sent out. He was telling me about his difficulty. I remember we ran in to a lot of difficulties of getting the pictures out, of getting the materials together and what not.

Q Did you ever discuss with Mr. Camisa the International Ballots Committee's position with regard to mailing out campaign literature?

A I don't recall discussing that.

Q Did you ever discuss either of those two topics with Mr. Schwartz?

A I don't recall talking to Mr. Schwartz about that. Those rules were set up by the AAA. I might have spoke about it after I got the rules, what they were, but I don't recall anything special. We went by the AAA's rules on the conduct of a ballot.

Q The AAA had nothing to do with the sending out of the ballots.

A They sent them out, they had everything to do with them.

Q With the preparation, they sent them out when they got them, but they had nothing to do with the ballot prior to their being prepared.

A They decided everyting about the ballot.

Q What did the International Ballot. Committee have to decide with regard to the ballot?

A They supervised the entire thing per constitution, but the AAA did everything as far as the ballot goes, a set number of things, where the numbers were and everything else as far as I know. I don't think you can go up to the AAA and tell them how to run the ballot.

I think they would throw you out.

Q The International Ballot Committee began meeting in late August of '71, correct?

A Yes. Sometime then.

Q For what purpose did they begin meeting?

A To set up the -- get the ballot out.

Q Okay, that is what they were doing, set-

ting up the ballot.

A In conjunction with the AAA.

Q Of course, the AAA were experts in running elections.

A That's right.

Q Are they not?

A Yes, indeed.

Q If the AAA was in on this from the start, why was Mr. Camisa's presence necessary?

A Because the AAA don't know about our records. The records -- the people have to be checked to see if they are in good standing.

Q I'm talking now about just setting up the ballot.

A Well, they set up the ballot. Of that I'm sure.

Q You say it took the AAA five weeks to set up the ballot?

A I didn't say that. Whatever time it took to set it up, they are the ones to set it up. The Ballot Committee did its part ascertaining the men were in good standing, what not, but getting out the paper as required by the constitution --

Q Wait a minute.

MR. SCHWARTZ: Hold on. Incidentally, have you taken the trouble to look at this ballot you are interrogating about?

MR. DANAS: I have.

MR. SCHWARTZ: Have you seen the variety of rules that have to be followed, the different quotations from the old constitution and things of that sort? Do you remember that?

MR. DANAS: Yes.

MR. SCHWARTZ: You astonish me.

MR. DANAS: Let's go back.

Q Captain Lowen at his deposition, testified that it was the duty of the International Secretary-Treasurer to go over the mailing list or the list of members and to certify their good standing.

Correct or not?

A That is true, he certified the list, yes.

Q All right.

So then the International Ballot Committee did not have to do this?

A I didn't say that they didn't -- they probably check it out, too.

Q They looked it over but they didn;t have to do it --

A I don't know. I am sure they had something to do with it.

Q All right.

If Captain Lowen did the certification of good standing and if Captain Lowen --

A Of the Offshore Division?

Q For what?

A For the Offshore Division.

Q Which is 70 per cent of the Union?

A At that time it wasn't. He had to get it all from the locals.

Q That's what Captain Lowen did. Captain Lowen forwarded to the International Ballot Committee a list of members in good standing, correct?

A Yes. I don't know how long it took him to do it.

Q I am not interested in how long it took him to do it. There came a time when he forwarded a list to the International Ballot Committee.

A He gave a list to the International Ballot Committee and the AAA, I assume.

Q Okay.

A He certified --

MR. SCHWARTZ: Don't look that way. The reason you are having trouble is you don't understand how it works, that's all.

MR. DANAS: I am trying to make the questions as simple as possible.

MR. SCHWARTZ: You seem to think your role in developing information is to cross examine, but that is not the problem.

MR. DANAS: I will try not to cross examine if that is what I have been doing.

Q In any event, Captain Lowen did forward a certified list of members to the International Ballot Committee and the AAA?

A Yes, sir.

Q And he also forwarded to the International Ballot Committee and the AAA a certified list of candidates, that the candidates were in good standing?

A That was checked by the Ballot Committee, I am sure.

Q Captain Lowen testified he did that.

A He did it with them probably, or he had

somebody do it with -- that had access to the files.

Q Now, besides certification of members for purposes of their vote and candidates, what other duties did the International Ballot Committee have?

A They have to observe the ballots being -- the entire ballot mailed, put together.

Q All right, now, we will stop there. You just testified that the AAA people --

A They do it.

Q --set up the ballot?

A That's right, they observed.

The Ballot Committee observes it.

MR. SCHWARTZ: For example, they have the order of candidates. Don't you realize all the opposition people at this time -- that their challenges the committee hears. That there are disputes. Sometimes it is done by pulling lots with the AAA supervisors. Sometimes it is agreed by everybody to do it alphabetically. This isn't a locked-in process.

It is a highly complicated involved business, a mutual effort by people trying to do

the thing the right way.

MR. DANAS: I understand that.

If there are challenges there may be hearings, appearances by the parties involved, drawing of lots, et cetera.

The AAA, I understand, is there to observe the fairness of those proceedings. I would like to know as between the International Ballot Committee and the AAA, who has the ultimate decision as to the order, let's say, of --

MR. SCHWARTZ: I want to tell you what the problem is. You have as part of your notice to admit a series of transcripts that make it explicit what the procedure is and if you would read them you wouldn't have all this trouble.

For example, we had a whole argument about this with people. The International Ballot Committee made certain rulings with regard to challenges. They said that they wanted to appeal to the AAA to have the International Ballot Committees finding reviewed and we said okay, we will take the AAA so long as you agree that the AAA's result is binding. We even started to have a hearing before Eric Schmertz --

MR. DANAS: Who is we?

MR. SCHWARTZ: The ballot people and I was representing them as counsel. And your other co-counsel, Burt Hall was up there. And we said if you agree everybody is going to be bound by what Arbitrator Schmertz says we will say okay.

He said no. He said if we don't like it we are still going to run to our prepaid legal assistance program that the U. S. Attorney runs with the Government and we are going to explain to him.

Under those circumstances we said we weren't going to agree to it.

It is all in your record.

MR. DANAS: Mr. Schwartz, despite what you may think, I have read the records and it seems to me most of the problems had to do with substitute appellate procedures, but I still could not find a clear decision as to who was in the first instan charged with making a decision.

MR. SCHWARTZ: Did you read the transcript where there was an argument about the postmarked ballots?

MR. DANAS: I don't recall.

MR. SCHWARTZ: That took about 80 pages. Did you read the transcript where we actually had Eric Schmertz there?

MR. DANAS: Yes.

MR. SCHWARTZ: Do you remember the discussion where they wouldn't agree to be bound by what he said?

Do you remember that. It is all there.

Q Captain, as between the AAA and the International Ballot Committee which body made the decision to the effect that all candidates had to mail their literature to New York for remailing by the AAA?

A I don't know which of them made it.

MR. DANAS: Mr. Schwartz, can you enlighten me on this?

MR. SCHWARTZ: I don't know offhand, but I think it was the International Ballot Committee. I am reasonably sure of that.

MR. DANAS: At whose instance or suggestion was such decision made by the IPC?

MR. SCHWARTZ: I don't know if it was anybody's suggestion or anything like that. I know

there was a substantial --

A That was the same as the last ballot, the previous ballot.

MR. SCHWARTZ: We began receiving reports of other unions that had an interest in the jobs of these men, contract jobs, beginning to participate with some of the other people and beginning to supply money, offering money to help distribute campaign literature and things of that sort, legal counsel.

One of the members, for example, was a lawyer for the MEBA and he was very interested in copying lists and taking lists out and supplying money and everything like that.

MR. DANAS: Well, it is probable, is it not, that somebody other than the -- as characterized before uneducated, at least non-sophisticated in election procedures, somebody other than members of the Board, expressed a concern to them with regard to this.

MR. SCHWARTZ: If you intend to interrogate the Ballot Committee people I am sure they will tell you.

I don't remember precisely how it happened.

Q With regard to the security of lists and the mailing to New York of campaign literature, Captain, did you yourself express in any way either through Mr. Camisa, Mr. Schwartz or directly to any member of the Ballot Committee a concern in that regard?

A Not that I recall. I know I was very concerned about outside influences on the election.

Q When and how did you first learn that candidates would be required to mail their campaign literature to New York for remailing by the AAA?

A Well, that was the practice from the prior elections, anyone that was running for International office before had to mail through the AAA.

That was done in elections prior to this, literature was sent to the AAA.

Q You are saying in the elections prior to the 1971 election there was a requirement that all candidates send their literature out through the AAA?

A The International office.

Q That was a requirement?

A Yes, because the International didn't handle it, the local handled their own prior to this.

This was the first time the AAA, with the exception of the Port of New York, handled any of the elections. The elections were handled on the local level by the locals, but the International offices had to send it through the AAA.

Q When did you first learn that with regard to this election that local candidates would have to mail their literature to New York City for remailing by the AAA?

A I don't know. Whenever the rules of the election came out. Now the Committee rules are approved by the procedures that the AAA -- they evidently agreed with the Balloting Committee if they made it first.

It is the only way they could do it, because how were they going to get the mails. The AAA was the ones that had the mailing list.

Q How did you learn of the decision?

A I don't recall how I learned.

Q Would your records reflect how and when

you first learned of such decision?

A No, I don't keep that good a record.

(Recess.)

Q Captain, just one question. You mentioned Murray Weiss before, the publicity man.

Is he still with the Union?

A No.

Q Where is he employed?

A I don't know.

Q When did he cease his employment with the Union?

MR. SCHWARTZ: I think at least three years, maybe a little longer.

We can find out for you.

A I am trying to think. Was Charles Crooks still alive when he left?

MR. SCHWARTZ: Yes.

A Well, then, it was before this. He would have had nothing to do with this.

MR. SCHWARTZ: I would think not, but I am not sure.

We can find out for you.

MR. DANAS: If Mr. Weiss was not the publicity manager in or about the fall of 1971,

in the election time at issue, I would like to know the name of the person who was and his current whereabouts, if you know.

MR. SCHWARTZ: All right, we will look. There was a hiatus of a substantial period of time, as I recall, between Murray Weiss and the present man.

We will check and see, but the next person for the Union was a man who came just a couple of months ago. We will check and let you know.

MR. DANAS: If Mr. Weiss was the publicity man during 1971, I would like to know when he left the employ of the Union and his current whereabouts, if known. If he wasn't I would like to know when he did leave the Union and who was the publicity man during 1971.

MR. SCHWARTZ: What we are talking about is the newspaper editor.

MR. DANAS: Fine. That would be someone who was publicity manager either of the Union or of Mr. O'Callaghan or any of the officers personally.

Q Is it your testimony that you yourself

did not transmit any thoughts of yours, or directives or advice of yours to the IPC or to the AAA with regard to the need or propriety of candidates for local port positions mailing their campaign literature to New York City for remailing by the AAA?

A I would say that I didn't transmit anything to the AAA, but I did have Miss Gibbons at that time -- whether or not the membership lists that were mailed ought to be in the hands of the -- in the ports because the people who were running would have been the first people who had the list.

Now, I am sure I passed that thought along to people. It was my opinion that they should not be in the ports if the agent of the port was on the ballot and he would have a list that everybody else would have.

Q Do you recall to whom you expressed these concerns?

A I am not sure, but I think it was discussed somewhere along the convention.

Q Did you transmit those concerns to any members of the International Ballot Committee?

A I wouldn't say for sure, but it would

seem logical I would have discussed it with counsel. I won't swear that I did.

Q What counsel?

A Marvin Schwartz. But I am not sure that I did.

At that time I thought it would be -- well, certainly if an agent of a port had a list in his hand then certainly everyone on the ballot should have one. That was my concern at that time.

Q Fairness, right?

A Yes.

Q Was there any constitutional requirement or requirement in the bylaws of the Union to the effect that the mailing of campaign literature had to be done through an independent mailing service?

A It would follow, the AAA conducts the election.

Q No, I am referring to the constitution of the Union.

A Oh, the constitution of the Union calls for a separate ballot in an association or a body that oversees the election, impartial agency.

Q Correct. I am now referring to mailing by a mailing service. Is there any specific requirement in the constitution for such independent mailing service?

A I don't know what you are talking about.

Q What an independent mailing service is?

A Yes, indeed.

Q Is there anything in the constitution which requires that campaign literature be mailed through such a service?

A No.

Q So far as the constitution goes, candidates are allowed to mail out literature at their own discretion?

A Well, they can't mail it out at their own discretion if they don't have a mailing list.

Q Assume they had a mailing list?

A Yes, they could.

Q They could send it out according to the constitution?

A Yes. I don't think there is a law preventing it.

Q Anyone having a mailing list can use it?

A Yes.

Q Do you think anybody who had a mailing list would use it?

A I don't know. I assume if they had a mailing list for the purpose of campaigning they might if they wanted to use it and I do know that several people had mail.

Q Assuming that a candidate did mail on his own, in other words, acting against the requirements of the AAA and perhaps the International Ballot Committee as well, do you know what sanctions, if any, were available with regard to that person's candidacy?

MR. SCHWARTZ: Excuse me, say that again?

Would you repeat that?

(Record read.)

MR. SCHWARTZ: I object to the form of the question. I don't know of anything yet that says the AAA said somebody can't use their own mailing list or whether the ballot list said they couldn't.

Don't you realize one of these people, a former International president takes the mailing list with them. They might not be totally up to date.

Where is there any suggestion that anybody could do any kind of mailing they want if it is available to them?

Q Which person do you allege had mailing lists?

A There's people right now got mailing lists.

Q Then in 1971?

A I don't know.

The same people involved now got mailing lists.

Q Name them.

A Koonce, Soto, S-o-t-o, these committees. They are all the same names back there and right now there is all kinds of mailings going out, general mailings to the membership and they are done by a mailing service, and this fellow Seybert and the other fellow from the West Coast, Oldfeld, they sign their names to it and it goes right through a mailing list. But the entire membership gets their propoganda right now in preparing for the next campaign.

MR. SCHWARTZ: As a matter of fact Soto testified in Court before Judge Gellen in November

that they have a mailing list of 6,000 people.

A In some cases they have got a better mailing list than I have got. Bob Lowen -- they have got a perfect address for him before I get it.

Q How come they have a better mailing list than yourself?

A I don't know. They do have a better mailing list than I do in some cases.

Q Of course, your list is updated from time to time by the ports?

A By the ports and whenever there is a change of address sent in, they are sent in to our people, our mailing people.

Of course now that is not the ballot committee. That is something different.

Q Are you saying Soto has a pipeline to these updates?

MR. SCHWARTZ: Just think for a minute how this can be done. There are any number of people who have been the perrenial opposition for the last twelve years. If you look back to the same people all the time, they themselves -- how do you think the International keeps a list --

these people themselves have to keep the old mailing list and the rest of it up to date. If they don't send in their new addresses or the other people on the committee don't send in the new addresses, then the International Committee doesn't get the update either.

There are some men who feel the same way these men do and I am sure they send them their new list and don't send it to the International.

It's been a perrenial group of guys. As a matter of fact, any time anybody gets defeated they automatically gravitate to them.

Q This was true in 1971?

A Yes. Local 88 had a bigger mailing list than the International.

Q If your opposition had the lists, what was the point --

A We get any number of requests and demands from our members that their addresses cannot be given to anybody. A number of our people do not want their addresses out to mailing houses, salesmen, and a lot of people are away from home.

Q In other words, your concern in 1971 was for the protection of the members' names?

A I don't say that, but in 1971 we had the same thing that our members didn't want their names given out to everybody. For the protection of the Union, if they go out and get our membership lists they get it from somewhere else, they don't get it from us.

The same thing with the Unions, the other maritime unions that we have trouble with. I certainly am not going to furnish the names of all the deck officers in the United States to an outfit like Amo who is trying to knock us out of the ball park.

Q In 1971 as today, officers of the various ports, did maintain lists of their members, did they not?

A In 1971, yes.

Q What about today?

A No. The only list is supposed to be in New York.

Q What about the situation now when the local port in Savannah wants to call a membership meeting; do they have to write to you to get a list of their own members?

MR. SCHWARTZ: I object to the form of

the question.

Who says they have a right to call a membership meeting.

MR. DANAS: Strike that.

Q If they want to contact their members for some reason, how do they go about doing it now?

A What would they want to contact them for?

Q I don t know why. It doesn't matter why.

A The International has all correspondence --

Q You say a port agent cannot contact his members now?

A He has no record to contact them.

Q So that he cannot?

A That's right. If they are registered on his shipping list and they leave an address or a phone number he can contact them probably. They would have to be on the shipping list or register there in order to be able to contact them. That would be strictly to phone to call for a job.

But there are no records as such maintained.

Q All right. What about the situation in which you called your Gulf Vice President and tell him to notify the Gulf people of certain actions that you took, what list does he have, if any?

A He doesn't need a list to call the officials in the Gulf. If there is anything the Gulf membership has to know, I notify them from my office, he doesn't.

The Gulf Vice President, the East Coast nor the West Coast Vice President have membership lists.

Q My question as of now, only the International office is able to directly contact the members of the local ports, is that correct?

A That's correct.

Q What about in 1971, those places were still local and they had their own list.

A Each port had its own or each local had its own membership list that it kept up.

Q Of course, as an incumbent, an incumbent would have access to those lists in 1971, would he not?

A He would have access to it, yes.

Q So the only thing that was accomplished by forcing the inspection of the lists here in New York, was to require insurgents or non-incumbents to come to New York, isn't that correct?

A No, it is not correct.

Q The incumbents would have to come to New York? Would the incumbents have to come to New York?

A If they wanted to inspect the list they would have to come to New York.

Q But they had a list, you said, correct?

MR. SCHWARTZ: They don't have a whole list.

Q They had a list of their local ports?

A Yes.

Q And if they were running for local offices that is all they needed, is that right?

A If they were running for local office, yes.

Q So if they were running for local offices the only persons who would have to come to New York to inspect a list would be their opponents, correct?

A I suppose that's true.

Q Of course you had a rooting interest in these incumbents, you were a team, were you not?

A Yes, we were a team. They had to use the list, they had to collect dues, they had to run the local.

I couldn't shut the local down.

Q There is no outstanding question, I don't think.

A No, okay.

Q What about as of the present time, you say that the International are the only people that maintain lists?

A Membership lists.

Q Of the local ports?

A That's correct.

Q How does the International obtain or update those lists that it maintains?

A We have address cards and it is on a machine and it is in our service.

Q You never obtained those through the local offices?

A No, not at all. The local offices might be notified by a member that a member has

changed his address in that port and might send it up from a member, but they have no record. Or they are not supposed to have any record, we will put it this way.

Q Let's discuss for a moment the requirement that an independent mailing service be used.

Now, on April 30, of 1971, you, in a letter which we marked the last time Exhibit A, sent out a notice of election and in that notice of election the potential candidates for office were notified that local mailing services would be used in connection with their candidacy, is that correct?

A I believe so, yes.

Q Why was the decision made that only a mailing service in New York City, no matter which one it was -- in this case it was the AAA, it could have been another one -- but why was the decision made that only a mailing service in New York City could be used contra your April 30th letter?

A That was a decision of the Ballotting Committee and the AAA.

Q You had nothing to do with it?

A I don't believe so, no. Other than I expressed, I thought the official list should be in the -- should not be in the ports.

Q I am not talking about the list. I am talking about an independent mailing service.

A Well, the independent mailing service was picked by the AAA. They were the independent mailing service. The impartial ballotting agency was the independent mailing service itself.

They handled the mailing and they mailed it.

Q You sent out a letter on April 30, 1971 to inform the candidates that local independent mailing services would be used.

Now, is it your testimony that the AAA, with no notification, no prior notification to any candidates, took it upon itself to make a decision to only require a mailing out of New York by itself? Is that your testimony?

A No, I don't know how they arrived at it.

Q What is your best recollection?

A I don't know how it was changed, whether the ballot committee or the AAA changed it.

Q Whoever changed it, must have been aware of your April 30th letter.

A I don't know if they were or not.

Q Was Mr. Camisa aware of your April 30th letter?

A I assume he was.

Q Was Mr. Schwartz aware of your April 30th letter?

A I assume he was, too.

Q And they were both present at the IPC meetings, were they not?

A I don't know. I assume they were. I wasn't there.

Q Did you yourself at any time notify candidates that there might be a change with regard to the use of local mailing services?

A I don't believe so. I don't recall.

Q Did you ever tell anyone informally that there might be a change, any candidates?

A I don't believe I did.

Q Did you ever discuss that with Moe Weinstein?

A I don't recall. I may have, but I don't recall any specific conversation about it.

Q But you may have?

A I may have. I may have discussed the thing with him. As I said, I discussed it in the manner I talked to you about before, about some people having a full list and some not having it.

Q Did you ever discuss it with Captain Friedman?

A I don't recall discussing it with him.

Q When was the first time that you personally became aware that you as a candidate would have to send your stuff out through the AAA here in New York City?

A Whenever the rules came out.

Q You mean the letter --

A But I knew before that I would have to do it because I was running for International office and I sent it out before, maybe in two elections before this I sent literature out through them. That's the only way I could send it.

Q You were confident it would remain the same for this election?

A I didn't know about it. But I wasn't surprised because that was the way I had become

used to doing it. We were dealing with the AAA, they handle the mailing service. That is part of their service and part of their -- when they handle a ballot it is part of their service as an impartial ballotting agency.

Q Did you inform any of the local incumbents that the New York City mailing service exclusively would be used?

A I didn't inform anybody of that.

Q It is your testimony that you didn't transmit to the IPC positive views of yours with regard to the New York City mailing list?

A No, I don't recall ever -- one thing I know, that I never attended a meeting of the IPC and I don't recall sending them directives or suggestions to them on how to conduct the ballot.

Q Either through Mr. Camisa or anyone else?

A Yes.

Q Or on the telephone?

A No, I don't recall any of that.

I make it a practice to steer clear of all ballotting, always have. That's been one of my policies, my personal policies.

Q Credo, right?

A Yes.

Q Did you receive any complaints in your capacity as President of the International from any local candidates with regard to the requirement that the mailing list be inspected only in New York City?

A I believe there was gripes about it, yes.

Q Do you recall the names of those persons?

A No.

MR. SCHWARTZ: Can't we save time? I think we agreed that the names that you had in your -- what was it— the notice to admit. I think we asked you who it was who complained and I think we got letters.

MR. DANAS: I think we got 16 names. I would like to know of any others.

MR. SCHWARTZ: 16.

MR. DANAS: 16 complainants.

MR. SCHWARTZ: I am positive we didn't get 16 letters, but we might have gotten letters signed by three or four guys.

A The same people always complain about everything and they were probably the ones who sent

the same complaint.

Q We agreed in 1971 nobody can complain because they had the list of the local incumbents?

A They didn't.

Q You just testified they did.

A They all had it. Now the people in Seattle didn't have the West Coast, the people in Portland, the people in Long Beach, didn't have it.

That was kept in San Francisco. From south of Newark here to Florida was kept in Baltimore.

Q The people in Savannah didn't have a list of Savanna locals?

A No, indeed, that was kept in Baltimore. Philadelphia was kept in Baltimore.

Q In 1971 how would the port agent of Savannah contact the members of his port?

A He didn't have members of his port. He was part of the 14 whose headquarters was in Baltimore.

Q He never independently met or contacted or communicated with his port members?

A It was done through Baltimore.

The secretary-treasurer --

Q What was done?

A The secretary-treasurer of local 14 was in Baltimore and he was going to send out communications to the members.

Q Were all meetings of the Savannah held in Baltimore?

A No.

Q Somebody notified the people in Savannah there would be a meeting a week from Wednesday?

A No.

Q How would they know?

A The meeting was held on a certain date, Monday of the month, and that is when it was.

Q What if there was a change?

A There was never a change. It was in the bylaws.

Q What if there would be a change?

A It would be sent to the Baltimore headquarters that the bylaws would be changed.

Q I am not referring to the bylaws.

MR. SCHWARTZ: That is what it is.

Q Let's say there was a fire in the

building and they had to put it off two days to get the stuff out of the way.

A There wouldn't be a meeting then if it wasn't held on the meeting day.

Q There was something sacred about meeting days?

A That's when the people knew there was a meeting, that day.

MR. DANAS: I would like provided to us a list as of 1971 of each and every port that maintained its own list of members and a list of the ports that didn't maintain its own list and where those lists were maintained.

MR. SCHWARTZ: I will try. I will do the best I can.

Q Captain, with regard to your testimony that as of now the local ports do not maintain a list, nor do they compile a list, I would like to read to you from Article 5, Section 7 of the International Organization of Masters, Mates and Pilots Constitution --

A I am speaking of the Offshore Division now.

Q Section 7 reads as follows:

"No later than the 10th day following the close of the nominating period each subordinate body shall furnish a list of members in duplicate to the International Secretary-Treasurer who have not been suspended for non-payment of dues unless the International office maintains such information."

And it goes on.

A That applys to the Panamanian Canal, any division that is a subordinate body and not a fully formed division.

The two fully formed divisions are the Pilots Division and the Offshore Division we have up here. The locals we don't and the --

Q The Offshore Division is not a subordinate body to the International, is that right?

A Not for the purposes of that paragraph. It does say unless the International keeps it. We keep it up here.

Q But for other purposes it is a subordinate body?

A Yes.

Q As is the Pilot Division?

A Yes.

A Yes.

Q As are the inland locals?

A Yes.

Q In August of 1971, early August, right after the Convention, did you ever receive any inquiry from Captain Robert Nelson, the Wilmington Port Agent, in which Captain Nelson inquired of you as to whether he would be allowed or would be able or should allow his local port list to be inspected by a candidate for election?

A Now, who did you say?

Q Captain Robert Nelson.

A Nelson? To the best of my knowledge, he had no local list. To the best of my knowledge his list was kept in San Francisco. He didn't have the list.

Q Did he ever contact you or inquire of you with regard to his ability or propriety to allow an inspection of the Local 90 list to any candidate?

A I don't recall it. Nelson was a member of the Ballotting Committee himself.

Q Correct.

A But I don't recall him asking me for that.

Q Did you ever send a letter to Captain

Nelson in early August of 1971 prohibiting such inspection of the local 90 list by candidates?

A I don't recall.

Q Would your records reflect whether such a letter was sent?

A Any letter that I sent is on file or should be. I don't know -- if they should be on file. I don't know whether --

Q Would you check your records to see whether such a list was sent to Captain Nelson in early August of 1971?

A Yes.

Q Did you have occasion to send any letters or have any oral communication with the Portland Port Agency, Charles Wallace, with regard to the propriety of Captain Dente, D-e-n-t-e, inspecting the local 90 membership list in Seattle or on the West Coast?

A I don't recall. When you say in August -- I don't recall. If it was after the decision was made, he could have called me or asked me and I might have told him what the Ballot Committee or what the rules of the AAA was. But I don't recall at this time.

Q In August of 1971 did you have any correspondence or discussions with Captain Stegall, or Captain Larry Landry, with regard to the inspection of membership lists in New Orleans by local candidates?

A I may have, but I don't recall.

Q Would you check your records?

A I will check and see if I got the correspondence.

MR. SCHWARTZ: If there is any correspondence, you will have that. It would be in the general file.

Q Did there come a time that you as International President contacted the International -- the AAA to inform them that the ballots for election should be sent out?

A I wouldn't tell them they should have been sent out. I might have called them and asked them. I never told them or directed it be sent out or any other conduct of the ballot.

Q You never sent them a letter directing them to send out the ballot?

A I may have sent the letter over my signature authorizing them to do certain things as

required by the constitution.

Q The constitution requires the president of the International to authorize the independent ballotting service to send out ballots?

A There are certain requirements they have to get from the International office. There is a box rented to receive --

Q I am talking about the ballots.

A Give me a little clearer -- give me an example of what you want. I don't understand you. Did I direct them to send out the ballots? No.

Q Did you authorize them to send out the ballot?

A There could have been a letter or statement that they were elected by the constitution to conduct a ballot and would they do it, or something of that sort. So if they accepted to send a letter that we agreed they are going to conduct the ballot if they accept, but they were elected by the convention, not by me.

Q They were chosen by the convention?

A By the convention. They were elected actually, because there were two or three names

and they were the ones that went out.

Q You say it is the constitutional duty of the President to do it, what you just referred to?

A Whatever I did was required by the constitution. I don't know what you are referring to.

Q I am referring to a letter that you just described.

A I don't recall the letter, but I probably -- if it was required to send it out I did.

Q I would like you to check the constitution at your leisure and let me know where the constitution provides for the President of the International to undertake such authorization and procedures.

A All right.

Q I thought I was clear that the constitution authorized the International Ballot Committee to be the only authorized body to deal with the independent ballotting service?

MR. SCHWARTZ: Hold on just a minute. I gave away my last copy. Can I take a look at the one you got?

A I knew the Ballot Committee doesn't pay them.

Q The International pays them, right?

MR. SCHWARTZ: There is a provision. You are talking about sending out. There are occasions as for example, page 20 under sub-paragraph G "The impartial ballotting agency has to get an order signed by the International President, International Secretary-Treasurer to proceed within seven days following the close of the ballotting to the safe deposit vault where the locked and seal deposit box is kept."

That is under the International. That is, of course, supervised in the initial stages by the International Ballot Committee. When they go to pick it up they have to show what their authorization is and who they are.

Q There was some question with regard to the 1971 election as to the date -- as to the cutoff date for the receipt of a valid ballot. The question involved whether the ballot should be postmarked on or before December 21, or whether it should have been received on or before December 21st.

Did you as International President make

any decisions in that regard?

A No.

Q Were you ever consulted with regard to that decision?

A I don't recall anyone asking me anything about it because to the best of my knowledge that thing was decided before the ballot went out unless there was challenges after, while the ballot was being counted or something of that sort.

I don't recall any detail of that, how many ballots you are talking about. I know there was ballots that weren't postmarked and there was some argument but eventually they were counted, if I remember correctly. But I wouldn't swear to that.

Q But you took no part in the decision?

A None whatsoever.

Q I believe you testified before that you at no point attended any meetings of the IBC, correct?

A I don't recall attending any meetings whatsoever of the Ballot Committee.

Q Now, on December 21st, 1971, the International Ballot Committee held a meeting in

New York City at which time procedures for the counting of ballots were to be discussed, the candidates were invited to attend. Did you attend that meeting?

A That was held up at the AAA and I wasn't in the building. I wasn't anywhere near it. No, I didn't attend.

Q Did you receive notice of that meeting?

A No, I knew it was going to come up. I didn't receive a notice. I knew it was going to come up. I knew the ballots were going to be counted that time and they were meeting at the AAA prior to -- and that notice had gone out from my office notifying all the candidates. I undoubtedly had received a letter, a form letter sent out to all the candidates.

Q As a candidate for International President, did you not have an interest in the proceedings at that December 21st meeting of candidates?

A The only interest I had that the thing was run honestly and it was done according to the constitution and according to the rules of the AAA.

Q Well, in order to assure and determine that such was the case, did you not feel it necessary to attend that meeting?

A No. There were all kinds of people attending that meeting. I am sure I could have added nothing to it.

Q What kind of people were attending that meeting?

A I know that every bit of my opposition attended it. I didn't think anyone could change any outcome of it, so I didn't go up there to add to the confusion.

Q How did you know your opposition would be there?

A How did I know --

Q Prior to the meeting?

A I didn't. I suspected, they always do show up at every ballot. Just like flies, they come around.

Q Was Captain Lowen at that meeting?

A I think he had to be. I would say -- I guess -- I am sure he was. I say I am sure, I guess he was.

Q You didn't feel as an incumbent president to be present at the meeting?

A I have never been to one. I have never been to a ballot meeting. Maybe I was nervous

but I saw no point in going there.

Q On the contrary, you sound like a cool candidate.

A I just never showed up at one of them.

Q Did you attend the actual counting of the ballots?

A No.

Q Did you attend any meetings at the AAA subsequent to the counting of the ballots when postmark problems were discussed, et cetera?

A No.

Q Did the general executive board in 1971 take any action with regard to the 1971 election procedures?

A If they did it is a matter of record. I don't recall them taking any.

MR. SCHWARTZ: I think you asked for those minutes.

MR. DANAS: If I didn't I would like to --

MR. SCHWARTZ: Yes, not only that I think there was some question about whether they had exhausted their income or some other reason. I think I indicated I wasn't sure, but I wasn't

raising that as an objection.

Q Did you ever send a letter to Mr. Tannenbaum of the AAA to the effect that the inspection of mailing lists should or must take place in New York City?

A I don't recall any such letter. I should look for it and if there is I will bring it up. But I don't recall.

Q The AAA sent a letter dated September 8, 1971 in which it informed candidates that campaign literature had to be received by them for remailing by September 13, 1971.

Did you receive a copy of that letter?

A I assume I did. I was a candidate. I don't recall the letter. I am sure I did if they sent it out.

Q Did your campaign literature reach the AAA before September 13?

A I am not sure, but I think a couple of weeks after the ballots went out mine did. I am not sure of that, but I think a couple of weeks, ten days.

Q After the ballots?

A After the ballots. I won't swear to

that, but I think so. If I remember correctly several people criticized me for sending it out late.

Q For what?

A Sending it out late, for not having it up there sooner. If memory serves me right, I sent it out late, ten days to --

Q In what manner did you send it out late?

A Well, I could have had it up there within a day of the ballot, the day before, the day after the ballot was sent out.

I think, as I say, if memory serves me right, it was about ten days after the ballot went out my literature was sent out.

Q I don't know if I asked this, but I would like a copy of all of your campaign literature for the 1971 elections.

A If I have got it, I will give it to you. I am sure there is some laying around somewhere.

Q And I did ask for the bills from Wirth-Strahler and any other printer you used?

A Yes.

Q And cancelled checks?

A Yes.

Q You mentioned at the last session of your deposition the fact that as opposed to 1971 there now exists permanent masters on ships, correct?

A Yes.

Q So that now the Union knows not only the ship involved, but the name of the master who is permanently assigned to that ship, is that right?

A They don't always --

Q Other than being on vacation or sick leave they know he's assigned to that ship?

A He's on it 180 days a year, but which 180 days we don't know.

Q The Union does maintain such a list?

A A seniority list, yes.

Q Whatever you want to call it it's a list of ships names?

A It is part of the agreement.

Q Where is that list maintained?

A In the contract enforcement, Captain Lowen's office.

Q At 39 Broadway?

A That's right.

Q Is that a computerized list?

A No. It's changed too often.

Q Does the Union maintain lists of members broken down by division?

A Yes. The Finance Division, the Offshore Division, the Offshore Division, yes, in the office.

Q And those are separate and complete from the newspaper list which is at your mailing service?

A That's right.

But it is in the computer. The computer reads out the man's name and his social security number, not his address, but his dues standing.

Of course, the computer does have his address in it if you want it.

Q I understand. What about for the inland locals, do you have that?

A They keep that, no, we don't have that. To the best of my knowledge, we don't have anything from the inland locals. They sent it in the same as before prior to any ballot that goes out to the entire International. They are required

to send in a certified list to us which we in turn send --

Q The members of the inland locals or on the newspaper list, are they not?

A Yes.

Q By the way, on that newspaper list, approximately how many names are contained thereon, whether they be members, libraries, congressmen?

A I would have to --

Q Approximately, what is the circulation of your newspaper?

A Maybe 10,000. Now, that is a guess.

MR. DANAS: Can we ask for the specific circulation of the newspaper and the size of that list?

MR. SCHWARTZ: Yes.

Q With regard to the AAA's deadlines September 13 for the receipt of campaign literature, did you have any involvement in the determination of that date?

A I don't recall any whatsoever.

Q Do you know if the IBC as a body had any involvement in that decision?

A I don't know.

Q What was your understanding as to what that date meant? Did it mean that any literature received by the AAA after September 13 would not be mailed out by them?

A Maybe at any time during the balloting term you could mail out literature from the AAA.

MR. DANAS: For the record, the documents reflect that the September 13th date was a date by which candidates had to notify the AAA that they would use the mailing service, not that they had to actually have the literature at the AAA office.

Q I asked you the last time with regard to the ILA affiliation matter to check records with regard to the first time that the matter was brought up at any meeting of the Executive Board or any other meeting of the International.

Did you check your records?

A I didn't have a chance to do it yet. I didn't know when I was coming back up here and I didn't know you wanted it this time. But I will check everything that you required -- you requested.

MR. DANAS: I would like at this point

to ask for a five-minute adjournment to see if we have any further questions. We may be finished today.

Just give us a couple of minutes.

MR. SCHWARTZ: All right.

(Recess.)

MR. DANAS: I just have a few more questions.

Q Captain, you stated before that the Offshore Division was a subordinate body to the International for certain purposes. Would you expand upon that? In what ways, in what areas is it subordinate?

A Well, I was -- when I used the word "subordinate" it is part of the International, the same as every other division, the subordinate of the whole. I don't know just what kind of an explanation you want. But it is subordinate in the same manner that any of the fully formed divisions are a subordinate body of the International.

Q Well, you are talking to a person who has no knowledge of what a fully formed body is, a layman with regard to that. So why don't you explain to me --

MR. SCHWARTZ: Why don't you let me explain?

MR. DANAS: I would like the Captain to explain it.

MR. SCHWARTZ: But part of the International constitution has certain things they have to do.

For example, they can change the dues.

MR. DANAS: Let me preface all of this, no matter which one of you want to answer, I would like to know what the relationship is as you see it, between the International and the Offshore Division with regard to independent or with regard to subordination and in what areas.

MR. SCHWARTZ: To tell you the truth, I wouldn't know how to answer a question like that. The form of the question is such I just couldn't answer it. You could read the constitution, the bylaws. In any international anybody who is part of the international gets certain authority to do certain things and in effect they can do anything that is not prohibited by the international consitution. And you know for example they have their own trial procedures.

eventually that can be reviewed by the International, because that is the same way with a local that isn't a division.

So frankly I wouldn't know how to answer it.

MR. DANAS: In the drafting of this little arrangement, there must have been some relationship in mind, something that the constitution was supposed to create. Can you give me some enlightenment on it.

MR. SCHWARTZ: The form of that question is something I wouldn't know how to answer. The idea was to eliminate a lot of friction between the locals, for example, they were operating under a common agreement.

The idea was to set the stage so that all the collective bargaining agreements could become one so that the pension plans could be merged, so the welfare plans could be merged and things of that sort.

And the only way to do it was to get the various offshore locals together, let them know men walking in and out of different ports has the same rights as any official in any port. He gets

the same kind of service that comes with that. There is no longer any situation where the old longshore locals had an independent dues structure.

The small locals would suffer and have to have higher dues. Here the dues of the entire Offshore Division, dues are the same. Dues are set at a minimum by the International, but the whole division sets their dues, they vote on their dues. That is the way the thing generally works up.

When a decision is made with regard to closing ports because of decrees in shipping it's done by the Offshore Division.

If somebody has to be charged, the Offshore Division is charged.

Nobody has been charged in the last 18 years, let alone tried. They have their own meetings and their own affairs, things of that sort. The council pretty much runs the affairs of the Offshore Division and the International is more or less a collective body.

The International in and of itself consists of 30 officials and about a half dozen others,

but it functions through the Divisions and locals that are part of it.

That is the kind of thing. Now, you can add on. There are certain minimum safeguards set forth in the International constitution with regard to disciplining and things of that sort. There are certain minimum safeguards where the International constitution says anybody wanted to amend their bylaws has to do it by referendum, you can't do it any other way.

That is the relationship. In that sense everybody is subordinate to the International rules. But the thought of creating divisions would end the problem of having a whole separate officialdom. It is not unusual. Some are International, some have a different kind of structure.

MR. DANAS: Just to summarize, I guess, it seems to me what you were saying is that the Offshore Division, as would be true of the Pilot Division, is independent of the International for certain purposes in certain spheres and in some spheres it is subordinate to the International's constitution?

MR. SCHWARTZ: Yes, and by and large

it is the constitution and also the convention. The convention in turn is limited by the constitution and what is the additional limitation.

In many unions, the National Convention where the delegates are separately elected, have a right to amend the constitution. In this union they can send it out for ratification. It rests on referendum. That is why in our papers we told you we had about seven referendums in different parts of the union since the dispute about the consolidation vote.

That is the way things are done.

So in that sense everything is subordinate to the membership.

Q In 1971, Captain, was there in existence a body called the General Executive Board of the Offshore Division?

MR. SCHWARTZ: It is the Offshore Division Executive Council, that is what it is. That is what the bylaws say. It has to be that.

Q Was there in existence in 1971 an Offshore Division Executive Council?

A When the constitution was adopted. It came in to existence when the constitution was

adopted.

MR. SCHWARTZ: And the bylaws.

A And the bylaws.

Q Of course there was a General Executive Board in existence of the International?

A Yes.

Q Do those two bodies have any jurisdiction or duties or involvement with regard to election procedures?

A I don't recall anything they would have done that would have changed the constitution would have had to go out on a ballot.

Q I am referring to the election of officers in 1971.

A I don't recall, but I will look it up. Any minutes are available.

Q In that connection, I would like to set the stage for the search of your records, in a letter you wrote to one L. Burlingame, dated July 6, 1971, you state "In accordance with the bylaws and constitution the Offshore Division Executive Counsel and General Executive Board acted on the procedures which will be followed for the upcoming election. The first, as you know, under

the new structure."

I would like a search of your records as well as of the minutes of those two bodies, and I would like you to provide us with specification with regard to what involvement, the extent of the involvement and the areas of involvement those two bodies had in relation to the 1971 election of officers.

MR. SCHWARTZ: We will look.

What date is the letter?

MR. DANAS: The letter is dated July 6, 1971.

Q As of the present structure of the Union, can members of any division other than the Offshore Division vote for any Offshore Division officer?

A Repeat the question. The Offshore Division officers?

MR. SCHWARTZ: You mean outside of the International officers who by virtue of their position, are executive officer and financial officer of the Offshore Division?

MR. DANAS: Besides these. I think we are clear as to that.

A Only in the case -- and when we find it out we stop it -- if a man has membership in two divisions. They are not supposed to. They don't in the Pilot Division and the Offshore Division, because we have a record of everybody by their social security numbers, but, of course, there are people with two social security numbers and people with two different names.

As far as the Union itself goes, you can't do it.

I might mention in the old days to keep peace there were people who belonged to two locals, but there was no way for the International to know that.

Q What you are saying then, so we are crystal clear, other than the three top officers of the Offshore Division, there are no other officers who are voted on or voted for by non-members of the Offshore Division?

A If they are full book members in good standing of the Offshore Division, the vote for officers, either to run or to vote in the Offshore Division.

Q Other than the three top positions.

A That's right.

MR. DANAS: I have no further questions at this point. What I would like to do is adjourn the deposition pending receipt of some of the documents, or of the documents that have been requested and the information that has been requested and at that point it will be clearer to us as to whether any further sessions of the deposition will be necessary.

MR. SCHWARTZ: I will begin to get some of the stuff I have been filing about a year ago. I don't expect it all at once. But now when can I get it?

MR. YOUNG: You are directing the question to me?

MR. SCHWARTZ: I suppose so.

MR. YOUNG: As we indicated yesterday, I am presently going through voluminous documents and I will make a good faith effort to get it to you before the end of this month.

It is enormous.

MR. SCHWARTZ: Let me say this: I appreciate that, that is the first time I got a concrete answer to most anything.

You don't want to wait until you get everything any more. You have to wait until I get everything. You have material and I would like to get what you have as you go along.

MR. YOUNG: As soon as I determine it's stuff you requested and there is no objection to my turning it over, then you will get it.

MR. SCHWARTZ: Just a minute. Contained in the depositions there are a whole bunch of things that I said you would give. I don't intend to wait until the end of July to begin to get any of the documents that you agreed to give.

If you are going to wait that long, I am going to make an application to compell their production.

MR. YOUNG: Mr. Schwartz, all I can do is assure you at this time that you will get anything that we promised to give you in those depositions as soon as I can determine that those are the proper documents.

I will turn them over, I will send them immediately. I have every reason to believe they

will be forthcoming during the next week, the following week, and the third week.

RM. SCHWARTZ: That is fair enough.

MR. YOUNG: Likewise I assume you will meet the same type schedule.

MR. SCHWARTZ: Yes, I will.

MR. YOUNG: While we are at it, if there is any confusion as to what is going on between the two of us I assume we can communicate by phone. I received a letter yesterday where you suggested we communicate in writing, but in view of the difficulties we had the last few days, I assume we can reach each other.

MR. SCHWARTZ: I haven't had a problem with you, so I will make the effort.

THE WITNESS: I would like to note -- I want you to bear with any possible delay I might have in searching for some of my records because a person I depended on very much, my private secretary, got the bad news that she has lukemia yesterday. Now she is going through extensive tests in the hospital. I am in hopes that she is back to work in a couple of weeks.

MR. YOUNG: Which one?

THE WITNESS: Mrs. Watson.

MR. YOUNG: I hope things work out.

THE WITNESS: Yes, because she is the kind of secretary you just don't replace every day. We could really depend on her.

MR. YOUNG: Any good faith effort you make in view of the circumstances, of course, we will adjust to accordingly.

(Time noted: 5 p.m.)

_____

Subscribed and sworn to before me

this____day of_____1974.

_____

BEST COPY AVAILABLE

CERTIFICATE

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, JULIAN WOLF, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That THOMAS F. O'CALLAGHAN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 18 day of July 1974.

Julian Wolf

JULIAN WOLF, C.S.R.

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Memo, Opinion March 17, 1976 - #44077

2860a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

72 CIV. 5031

1/4/77

- -x

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CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION
On
MOTION FOR SUMMARY JUDGMENT

This action was brought by the Secretary of Labor of the United States Department of Labor pursuant to Section 402 of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 482. In the complaint, plaintiff alleges that the defendant union during the course of its 1971 election of officers committed various violations of

Section 401 of the LMRDA, 29 U.S.C. § 481, which therefore require that the election be overturned. Accordingly, the complaint asks that this court void the 1971 election of officers of the International Organization of Masters, Mates and Pilots ("IOMM & P") and order a new election subject to the supervision of the Secretary of Labor.

While the complaint alleges a number of violations of 29 U.S.C. § 481, for purposes of the instant motion for summary judgment plaintiff has limited consideration to five claimed violations:

1) The preparation and August 19, 1971 mailing by the IOMM & P of the "60th Convention Newsletter on the Resolution of Affiliation of the IOMM & P with the ILA" ("Newsletter"), which plaintiff contends constituted campaign literature prepared in violation of 29 U.S.C. § 481(g) and distributed in violation of 29 U.S.C. § 481(c);

2) The preparation and November 26, 1971 mailing by the IOMM & P of another document entitled "All Constitutional Amendments and Resolution of the 60th Convention Ratified — Affiliation of IOMM & P as the International Maritime Division of the ILA (AFL-CIO) Affirmed," which plaintiff similarly contends to be campaign literature distributed in violation of 29 U.S.C. §§ 481(c) and 481(g);

3) The election procedure followed in the 1971 election of the IOMM & P Offshore Division Vice-Presidents for the Atlantic and Gulf areas, which allegedly, in violation of various provisions in 29 U.S.C. § 481(e), prohibited many members in the Offshore Division's Atlantic and Gulf areas from participating in any way in the selection of said two Vice-Presidents;

4) The failure to mail ballots within 30 days after the close of nominations for the International and Offshore Division offices in the 1971 action, contrary to Article V, Section 8(d) of the IOMM & P Constitution, and therefore contrary to 29 U.S.C. § 481(e) of the LMRDA which provides that an "election shall be conducted in accordance with the constitution and by-laws of [the labor union] insofar as they are not inconsistent with the provisions of this chapter"; and

5) The failure on the part of Local 88 (now the Port of New York) to comply with its bylaw that "[a] certified mailing list of all members of Local 88 shall be made available at cost to all candidates, provided however that any postage charges shall not be billed to this organization," which, if proven, also constitutes a 29 U.S.C. § 481(e) violation, as in item 4 above.

Defendant in turn has itself moved for summary judgment or, in the alternative, for partial summary judgment. The union's independent motion for summary judgment seeks to dismiss the complaint on the ground that it is moot, in view of the intervening election conducted by the defendant in 1974 [1/] and the facts and circumstances surrounding such election. This is also the position taken by amici curiae Frank T. Scavo, Gerald Johnson and Timothy Brown, who, as candidates in the 1974 election, challenged the incumbents who had been elected in 1971, with the result that Scavo and Johnson replaced such incumbents in the position of President and Executive Vice-President of the IOMM & P.

Defendant's alternative motion for partial summary judgment seeks dismissal of certain alleged violations of 29 U.S.C. § 481 described in the plaintiff's complaint, but not urged by him in his motion for summary judgment currently under consideration. In addition, defendant has cross moved for summary judgment as to the violation alleged to have occurred in connection with the 1971 election of the IOMM & P Offshore Division Vice-Presidents for the Atlantic and Gulf areas.

For the reasons set out below, this court has decided to grant plaintiff's motion for summary judgment,

thereby voiding the 1971 election of IOMM & P officers, and accordingly orders that a new election be held under the supervision of the Secretary of Labor. Defendant's motions are in effect thereby mooted. In reaching this conclusion, the court has had to make a series of preliminary determinations which will now be considered seriatim.

Exhaustion of Remedies

A threshold question raised by defendant is whether or not union members who complained to the Secretary of Labor regarding the 1971 election, thereby triggering this action, properly fulfilled the exhaustion of remedies requirements set out in 29 U.S.C. § 482. Section 482(a) requires a complaining union member to file his complaint with the Secretary within one month of having exhausted remedies available under the constitution and bylaws of the union or within one month after invoking the available remedies without obtaining a final decision within three months after their initial invocation. In the instant case, 16 complaining members, through their attorney, Burton Hall, wrote to the General Executive Board, the final appellate body of the union, setting forth their complaints on January 19, 1972. The General Executive Board

met on January 25 and 26, 1972 to consider these appeals, and by letter of February 29, 1972, postmarked that date and received March 2, 1972, the union advised the complaining members through Burton Hall that their appeals had been denied on January 26, 1972. The members thereafter filed their complaints with the Secretary on March 29, 1972, within one month of the mailing and receipt of the February 29, 1972 letter.

Defendant now contends that the complaints should have been filed with the Secretary by February 26, 1972, one month after the actual decision by the General Executive Board. Defendant alleges that the complainants were aware that the General Executive Board was meeting on January 25 and 26, and therefore implies that they knew or should have known that some action was taken on their complaints at that time. Defendant does not allege that complainants actually were notified. Given these circumstances, the court finds that the complainants cannot be held to have exhausted all internal remedies until actual formal notification that the appeal was denied. To decide otherwise would place an undue burden on those invoking the protections afforded under 29 U.S.C. § 482. A union — as did defendant union here — could hold off notifying complainants of a disposition in their case until after a month

had elapsed, thereby precluding them from bringing such action to the Secretary of Labor, unless through their own efforts they had discovered and acted upon the union's disposition. Certainly such a procedure does not comply with the Supreme Court's mandate that "unions [are] expected to provide responsible and responsive procedures for investigating and redressing members' election grievances." Wirtz v. Local No. 125, Laborers' International Union, 389 U. S. 477, 484 (1968). Nor does it comport with the admonition of the Second Circuit, in affirming a decision rendered by this court, that "procedural perversion of the exhaustion requirements of § 402(a) will not be permitted." Hodgson v. Liquor Salesmen's Union, Local No. 2 of State of N. Y., 444 F.2d 1344, 1350 (2d Cir. 1971). In that case, defeated candidates were held to have successfully exhausted their remedies, though through circumstances beyond their control — a mail strike — they had been unable to file an appeal with the union within the brief time allotted by the union constitution.

In Shultz v. Radio Officers' Union of United Telegraph Workers, 344 F.Supp. 58 (S.D.N.Y. 1972), Judge Pierce was faced with a situation analagous to the present action. In that case, defendant union argued that the complainant had not timely filed his complaint ("intention to appeal") with the

union within 10 days as a union constitutional provision required. The union argued that the complainant's December 26, 1969 appeal was untimely because the election ballots had been counted December 1, 1969. The complainant argued that he had not been made fully aware of the final results until December 26, 1969. While the court ultimately found the 10 day provision to be inapplicable, it went on to find the complaint timely filed under such provision nevertheless. Judge Pierce specifically found that the union "did not communicate this information [election results] to [the complainant] in formal notice at any time prior to December 26, 1969." 344 F.Supp. 67. He noted that "[t]he responsibility for Smith's [the complainant] lack of knowledge of the election results rests with the ROU [the union]. Thus the defendant failed to trigger the running of the 10 day period. . . ." 344 F.Supp. 67.

In the instant case, the running of the one month period prescribed in 29 U.S.C. § 482 was similarly triggered by the letter of February 29, 1972, notifying complainants of the General Executive Board's decision. A complaint was filed with the Secretary of Labor within one month thereafter, and thus the exhaustion of remedies requirements were duly fulfilled.

Mootness

Another argument put forward by defendant union, which serves as the underpinning of its summary judgment motion, is that the present action is moot and ought to be dismissed, in view of the intervening election conducted by the defendant and the facts and circumstances surrounding such intervening election. This is also the theory put forward by the three amici curiae appearing in this case, each of whom was a candidate in the 1974 election, and two of whom successfully unseated incumbents who had been elected in the 1971 election.

Defendant union argues that the staging of a new election under the Secretary's supervision would be unnecessary and redundant. It maintains that none of the defects alleged to have affected the 1971 election were repeated in the 1974 voting. It maintains further that any possible taint resulting from 1971 irregularities had been eradicated by the time of the 1974 election, citing the fact that a large majority of those candidates running on the slate of President Thomas O'Callaghan, which had been victorious in 1971, were defeated in the 1974 voting.

Even assuming that none of the irregularities alleged to have taken place in the 1971 election were repeated during the 1974 election — which is not a question properly before this court at this time [2] — the court is unable to conclude that no taint remained from the 1971 violations themselves. In Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U. S. 463 (1968), the Supreme Court stated unequivocally that the statutory scheme to remedy election violations by a supervised election would be unfulfilled by "the happenstance intervention of an unsupervised election." 389 U. S. 474. The Court continued:

> "The notion that the unlawfulness infecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election." 389 U.S. 474.

Nor can the defendant union rely on the fact that a majority of those elected in the 1971 election were unseated in 1974, since, as the Supreme Court stated, the purpose of the scheme set up by the LMRDA was not "merely to protect the right of a union member to run for a particular office in a particular election. . .for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." 389 U. S. 475.

Congress intended to guard against a multiplicity of influences which the results of a tainted election may have on subsequent union activities. In this case, for example, the results of the 1971 election may not only have allowed incumbents to have maintained a personal advantage for the 1974 election, but also may have prevented others from rightfully developing the same benefits of incumbency. Others, too, may have withheld their candidacies in 1974 preferring to await an election that was supervised by the Secretary of Labor. In all respects the day to day decisions of the union leadership may have been different over the last three years had other officers been elected in 1971, and such differences may have led to different results in 1974. Just because incumbents do

not win re-election does not mean that the subsequent unsupervised election was not in some way affected by the results of the challenged election. The possible influences on the outcome of the 1974 election are incalculable and the only way to guard against them is to have the remedial election supervised by the Secretary. A supervised election guards against much more than just incumbents flaunting their incumbency at the time of the subsequent unsupervised election.

Burden of Proof and Appropriateness of Summary Judgement

The standards to be applied by the court in determining the appropriateness of the supervised election remedy are set forth in Section 402(c) of the LMRDA, 29 U.S.C. § 482(c):

> " (c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—
>
> * * *
>
> (2) that the violation of Section 481 of this Title may have affected the outcome of an election,

> the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary. . . "

It is clear from the statute that a preliminary determination which must be made by the court before ordering a remedial election is that a violation of 29 U.S.C. § 481 has indeed taken place. This in itself does not suffice, however, since the statute requires an additional finding that such violation "may have affected the outcome of an election." In the case of Wirtz v. Hotel, Motel & Club Employees U., Local 6, 391 U. S. 492 (1968), the Supreme Court considered extensively the burden of proof which should be applied in determining whether or not this finding can be made. In its decision, the Court articulated the principle that a proved violation of Section 481 establishes a prima facie case that the violation "may have affected the outcome" of the election and that the only way a defendant union may overcome such a prima facie case is to prove that the violation did not affect the outcome of the election.

In that case, the Secretary alleged and the Supreme Court so held, that a bylaw of the defendant local limiting

eligibility for major elective offices to union members who held or had previously held certain elective office was not a "reasonable qualification" to hold office as prescribed in 29 U.S.C. § 481(c) and that the enforcement of the bylaw may have affected the outcome inasmuch as it denied members the opportunity to hold elective office. The Supreme Court then ordered a new election held under the Secretary's supervision.

The Court examined the factors considered by the district court and reasoned that the factors presented by the defendant union did not constitute evidence which met the prima facie case established by the violation itself:

> "None of the factors relied on is tangible evidence against the reasonable possibility that the wholesale exclusion of members did affect the outcome. Nothing in them necessarily contradicts the logical inference that some or all of the disqualified candidates might have been elected had they been permitted to run." 391 U.S. 508.

Thus, once a Section 481 violation has been demonstrated, a very substantial burden falls upon a defendant union. It must show by a preponderance of the evidence that the particular violation did not affect the outcome of the election. Until it does so, the presumption remains that such violation might have had an effect on the results, and this presumption of mere possible influence suffices to warrant a new supervised election.

This burden on the union is so great as to be insurmountable in some cases. For example, in Wirtz v. Local 40, 366 F.2d 438 (2d Cir. 1966), the Second Circuit considered an election in which it found that some union members were deprived by the union constitution of a "reasonable opportunity" to become candidates for union office contrary to § 481. Although the case was ultimately dismissed on grounds of mootness, the court did consider the burden involved in determining the actual effect of the violation on the election results. The court ultimately decided that "there can be no tangible evidence available of the effect of this exclusion on the election." 366 F.2d 443. This court reached the identical conclusion with regards to a fact pattern very similar to that in this case.

In Hodgson v. Liquor Salesmen's Union, Local No. 2 of State of New York, 334 F.Supp. 1369 (1971), aff'd 444 F.2d 1344 (2d Cir. 1971), this court considered union journals published just prior to an election and found them to contain statements designed to promote the candidacy of incumbents in violation of 29 U.S.C. § 481. There, too, the court found that "'there can be no tangible evidence available' of the effect of the violation." 334 F.Supp. 1369 (1971).

In both of the above cases, the courts found that there was a "reasonable probability" that the violations had affected the outcome of the elections in a way sufficient to warrant invalidation of the elections (although this was not the ultimate resolution of Wirtz v. Local 40 because of a mootness issue.). An application of the prima facie principle articulated by the Supreme Court in Wirtz v. Hotel, Motel & Club Employees U., Local 6, supra, would make even this separate finding of "reasonable probability" unnecessary, in cases where there is insufficient evidence available one way or the other as to the effect of a proven violation of 29 U.S.C. § 481 on an election. In such cases, the contested election must be invalidated.

A question which arises from this analysis is the appropriateness of summary judgment in those cases where it can be shown that there is no genuine issue of material fact either as to the commission of a 29 U.S.C. § 481 violation or as to the inability of the union to produce evidence sufficient to overcome the presumption that such violation may have influenced the results of the election at issue. The relevant statute, 29 U.S.C. § 482(c), does, it is true, specify that the court is to act "upon a preponderance of the evidence after a trial upon the merits." (emphasis added). In interpreting this provision, however, the courts have generally concurred that summary judgment is not precluded. Brennan v. Local U. No. 639, Int. Bro. of Teamsters, etc., 494 F.2d 1092 (D.C. Cir. 1974); Hodgson v. District 6, U.M.W., 474 F.2d 940 (6th Cir. 1972); Schultz v. Independent Employees Union, 62 L. C. ¶10, 869 (E.D. Wisc. 1970); Wirtz v. Local 1622, Carpenters, 285 F.Supp. 455 (N.D. Cal. 1968). Contra: Hodgson v. District 5, U.M.W., 68 L.C. ¶12, 867 (W.D. Pa. 1972). In the only case from this circuit cited by either party as relevant to this particular question, Judge Lasker had no qualms in granting summary judgment where union funds were used to distribute material found to be campaign

literature. Brennan v. American Guild of Variety Artists, AFL-CIO, et al., Civ. 74-3004 (S.D.N.Y. 1974). However, the sole remedy afforded in that decision was apparently a declaratory judgment, rendering it largely irrelevant to present considerations.

This court ultimately adopts the reasoning put forward on this question by the Circuit Court for the District of Columbia in Brennan v. Local U. No. 639, Int. Bros. of Teamsters, etc., supra. There, the court, upon examining the legislative history of the LMRDA and the tradition of judicial interpretation of congressional labor legislation, concluded that the essential feature regarding adjudication under 29 U.S.C. § 482(c) was that a new election could only be ordered by an Article III Court acting according to the procedural panoply incumbent on such a court. The court concluded that "it would be sheer folly to require the expense and delay of a trial when other methods of resolution are available" and noted that "Rule 56 itself has strict requirements which must be satisfied before summary judgment can be granted." 494 F.2d 1096. This court concurs.

The Alleged Violations

It having been decided that summary judgment is at least theoretically available in the instant case, it remains for this court to consider the particular violations alleged by the Secretary to determine whether any of them actually warrants such a resolution.

On August 19, 1971, the IOMM & P mailed to each of its members a document entitled "60th Convention Newsletter on the Resolution of Affiliation of the IOMM & P with the ILA." The cost of the preparation, duplication and distribution of this Newsletter was paid for with monies received by the IOMM & P by way of dues, assessments or similar levy, and the union expended more than $3,000 on the preparation, duplication and distribution of the Newsletter. It was sent to approximately 10,400 members in a mailing done using addresses on file at the union International headquarters on a computerized list. Although the union purports that the Newsletter deals only with its merger with the International Longshoreman's Association, the Secretary maintains that the document contains campaign statements vilifying the opposition and praising incumbents. Therefore, the Secretary alleges that the Newsletter

involves three separate union violations of the prohibitions of 42 U.S.C. § 481:

1) By preparing and distributing this campaign literature using union resources, the union violated § 481(g);

2) By distributing the Newsletter using its lists of members, the union did not "refrain from discrimination in favor of or against any candidate with respect to the use of lists of members" in violation of § 481(c); and

3) By failing to offer "similar distribution at the request of another bona fide candidate," the union violated § 481(c) in another respect.

These allegations have, in fact, already been at least partially litigated. With respect to the Newsletter, three insurgent candidates, on September 16, 1971, brought an action in the Southern District of New York against the union and three incumbent candidates. They alleged, inter alia, that the Newsletter was campaign literature prepared and distributed at the expense of the defendant union and that their request to have the IOMM & P distribute their comparable literature prior to the balloting had been denied in violation of 29 U.S.C. § 481(c).

In a decision dated October 18, 1971, Sheldon v. O'Callaghan, 335 F.Supp. 325 (S.D.N.Y. 1971), Judge Croake stated:

> "The court finds that the 'Newsletter,' containing electioneering for the incumbent candidate, ad-hominem, attacks upon an opposition candidate, coupled with the timing of the distribution, constitute campaign literature for defendant-O'Callaghan distributed at the expense of defendant labor organization. Plaintiffs are entitled to the opportunity to have campaign literature distributed in a similar manner and with equal force as that of the defendants." 335 F.Supp. 327-28.

Judge Croake went on to deny injunctive relief restraining the mailing of ballots until after plaintiffs' campaign materials had been sent out, noting that "[t]he LMRDA provides for post-election remedies, so as to prevent blocking or delaying of Union elections while affording adequate relief through enforcement by the Secretary of Labor. . ." 335 F.Supp. 328. It is precisely such "post-election"

remedies which are being sought in the present action.

This court, in examining the Newsletter itself and considering the context in which it was distributed, concurs in the opinion of Judge Croake that the Newsletter constitutes campaign literature distributed in violation of 42 U.S.C. § 481. However, it is also the conclusion of this court that such a finding by this court is not an essential element to the resolution of the present action, because the defendant union is already bound by the finding to the same effect in Judge Croake's opinion. As a party to the action before Judge Croake in which the identical issue—as to whether the Newsletter was campaign material distributed at the expense of IOMM & P—was litigated in a similar context as the one herein, the IOMM & P is collaterally estopped from asserting any findings contrary to those made by Judge Croake. Zdanok v. Glidden Co., 327 F.2d 944, 954-56 (2d Cir. 1964), cert. denied, 377 U. S. 934 (1964). The union contends that this particular question was not "fully litigated" by Judge Croake since the decision was based on the submission of the Newsletter itself and affidavits describing its contents and the context in which it was distributed, rather than on an evidentiary hearing. However, such

material was clearly all the information necessary for the disposition of such a question, and the judgment on such question was therefore "final" in the sense required by Zdanok:

> "'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." 327 F.2d 955, citing Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2d Cir. 1961), cert. denied, 368 U. S. 986 (1962).

It thus being determined that the publication and distribution of the Newsletter constituted a violation of 29 U.S.C. § 481, a prima facie case has been made out for the proposition that such violation may have affected the outcome of the 1971 election, warranting the voiding of such election and the ordering of a supervised election under 29 U.S.C. § 482(c).[3/] For purposes of the Secretary's ummary judgment motion, the court must next consider whether there exists a genuine issue of material fact as to the possibility of the

IOMM & P adducing sufficient evidence to meet its burden of showing by a preponderance of the evidence that such violation did not affect the election. The court finds that there can be adduced in this case no tangible evidence sufficient to meet defendant union's burden and accordingly grants plaintiff's motion for summary judgment.

The court bases this conclusion on the following uncontested facts: On August 19, 1971, the IOMM & P mailed to each of its members the Newsletter which this court finds to be violative of 29 U.S.C. § 481. On September 21, 1971, the American Arbitration Association ("AAA"), which the IOMM & P had selected as its impartial balloting agency to conduct the union's 1971 election, mailed ballots for said election to the members of the IOMM & P. In this election, International President O'Callaghan ran as part of a team, which included International Executive Vice-President Caldwell, International Secretary-Treasurer Lowen, and all incumbent port officers. He was opposed by Lloyd W. Sheldon, who was part of a team running for the International offices and associated with an organization of IOMM & P members known as Members for a Democratic Union, which also supported candidates for port offices. There was in addition a third slate

of candidates running for the International offices. On September 16, 1971, Lloyd Sheldon and two other candidates associated with him brought the action before Judge Croake, described above, against the IOMM & P's incumbent International officers. On November 4, 1971, Judge Croake ordered the IOMM & P to publish and distribute campaign literature submitted by Sheldon and his co-plaintiffs "in a manner similar to the publication and distribution given the newsletter . . ." Pursuant to Judge Croake's order, Sheldon submitted literature to the AAA sometime after Judge Croake's order and shortly before November 9, 1971. The AAA mailed Sheldon's literature shortly after November 9, 1971, and by that time 3,000 to 4,000 ballots had been cast and returned. All ballots were required to be received by December 21, 1971, and when the ballots were actually counted on December 22, 1971, all those on the O'Callaghan team, with the exception of one minor candidate (J. Haring, who was running for Assistant Port Agent of Wilmington), either won outright or won a sufficient number of votes to enter a run-off.

Given this framework of facts, it would be impossible for defendant union to produce tangible evidence sufficient to overcome the prima facie case that the Newsletter

may have influenced the election. Even assuming that the November 9th mailing purged all subsequent voting of the discriminative effects of the Newsletter (which is not a valid assumption at least as regards the third slate of International candidates opposing both O'Callaghan and Sheldon, which never was afforded a union-financed mailing), the voting which took place before November 9 was clearly of such magnitude that the results of the entire election could have hinged on the effect of the Newsletter on this pre-remedy balloting. This fact is dramatically demonstrated by the affidavit and accompanying chart annexed as Exhibit EE to plaintiff's 9(g) statement. In that affidavit, Brian P. O'Hanlon, Compliance Officer with the New York-Area Office, Labor Management Services Administration, states that upon examining the ballot envelopes from the election he is able to determine how many members within each Port of the Off-shore Division had voted by certain specific dates. The accompanying chart shows that in every Port there had been ballots cast by November 9, 1971 pctentially sufficient to have changed the result in all contests of the disputed election.[4/] While defendant union, in its response to plaintiff's 9(g) statement, makes no claim that these computations are

incorrect, it does deny them on the ground that it "has no knowledge of the source of such document nor does it admit to the statements therein." This allegation is clearly inadequate to raise a genuine issue of material fact regarding this matter. The affidavit in question explicitly outlines the documents from which its conclusions are derived, and furthermore notes that "[a]ll the documents mentioned herein are available to the parties and the court for inspection." Under these circumstances, the mere fact that defendant has failed to examine and analyze these sources does not suffice to raise a genuine issue of material fact.

The major argument which defendant puts forward to meet its burden of showing that the Newsletter did not influence the voting is the fact that some members of the O'Callaghan team won by greater margins than did O'Callaghan himself. The union claims that this rebuts the prima facie case that the Newsletter may have influenced the votes for his teammates. The court does not comprehend this argument. All that need be shown is that the Newsletter may have influenced the votes cast. Just because O'Callaghan barely avoided the necessity of a runoff in 1971 while others in his team had greater success in the polling does not mean

that those who voted for the others were not influenced at all by the Newsletter.

In short, it is clear to this court that there exists no tangible evidence by which defendant can show that the Newsletter did not influence the 1971 election. There is no conceivable way in which defendant can confront and overcome the imponderables inherent in analyzing the decisions made by each elector in 1971 in choosing to vote or not to vote and in selecting the particular candidate for whom to vote in each of the various contests on the ballot.

Accordingly, this court sees fit to grant plaintiff's motion for summary judgment, declaring the 1971 election of officers conducted by the defendant void and ordering a new election under the supervision of the Secretary of Labor. In so doing, the court does not feel it necessary to consider the additional four violations alleged by the Secretary as the basis for his summary judgment motion, since the Newsletter violation, upon which the motion is hereby granted, comprehends all of the contests in the election which are involved in the additional alleged violations, and any decision regarding such violations would not affect

the ultimate disposition of the case.

Within five days of receipt of this opinion, submit order on notice.

Dated: New York, New York

March 17, 1976

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. This 1974 election included a run-off election which actually transpired in 1975.

2. The Secretary of Labor has instituted an action before this court, 75 Civ. 2095, contesting certain aspects of the 1974 election. That action will become moot as a result of the supervised election conducted pursuant to the granting of summary judgment for plaintiff in the instant action.

It should also be noted that in the case styled Sheldon v. O'Callaghan, 497 F.2d 1276 (2d Cir. 1974), cert. denied 419 U.S. 1090 (1974), affirmed from the bench by 2d Cir. on second appeal, February 26, 1976, it has been held that the 1970 constitution of the IOMM & P, under which the 1971 election was conducted, was adopted improperly in that dissident views on the adoption of that constitution were not properly disseminated by the union officers. An elaborate remedial procedure formulated by District Judge Knapp and affirmed by the Second Circuit does not void the 1970 constitution, but merely establishes a lengthy procedure whereby the union must take action to allow the membership to reconsider and vote upon it. Were the 1970 constitution to be discarded, which is not at all a certainty, yet another election would perhaps be mandated. Yet this possibility is far too tenuous to prevent this court from remedying the violations which it finds to have occurred in the matter duly before it.

FOOTNOTES, cont'd

3. See p. 14 supra.

4. The relevant number of ballots which potentially could change the result of an election is one-half of the margin of victory plus one.

Judgment and Order April 15, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2892a

72-3582

W. J. USERY, Secretary of Labor
United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

NOTICE OF SETTLEMENT

72 Civ. 5031 (CBM)

S I R S:

PLEASE TAKE NOTICE that the within Judgment and Order will be presented for settlement and signature before the Honorable Constance Baker Motley, United States District Judge, Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, on April / , 1976 or as soon thereafter as counsel can be heard.

Dated: New York, New York
March 18, 1976

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Plaintiff

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DY,JR.:cf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff,

-v-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

- - - - - - - - - - - - - - - - - - - X

28930

JUDGMENT AND ORDER

72 Civ. 5031 (CBM)

U.S. DISTRICT COURT FILED
APR 15 1976
S.D. OF N.Y.

The above action having been brought by the Secretary of Labor of the United States Department of Labor, (the "Secretary") pursuant to Section 402 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482, seeking to void the 1971 election of all International officers of the defendant union, International Organization of Masters, Mates and Pilots, and all the officers of the defendant union's Offshore Division and to have a new election for those positions ordered conducted under the supervision of the Secretary and

The Secretary having moved for summary judgment on the issues involved herein, and

The Court on March 17, 1976 having handed down a Memorandum Opinion granting summary judgment to the plaintiff, Secretary of Labor,

NOW, on motion of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for plaintiff herein, it is hereby

ORDERED, ADJUDGED AND DECREED that:

2894a

(1) the 1971 election of all International officers of the defendant union, International Organization of Masters, Mates and Pilots, and all the officers of the defendant union's Offshore Division is hereby declared void; and

(2) a new election under the supervision of the Secretary of Labor shall be conducted for all International officers of the defendant union and all officers of the defendant union's Offshore Division in accordance with Section 402(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482(c); and said new election shall be completed no later than December 31, 1976, provided, however, that in the event any run-off election becomes necessary the Secretary shall have the authority to determine the date by which said run-off election shall be completed; and

(3) the Court shall retain jurisdiction over this matter until said new election has been certified in accordance with Section 402(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482(c).

Dated: New York, New York

March 25, 1976

CONSTANCE BAKER MOTLEY
United States District Judge

Judgment entered this

15 day of April, 1976

Raymond F. Burghardt
Clerk

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

2895a

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

MANUEL BERMUDEZ being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

19th day of March, 19 76 he served a copy of the within Proposed Judgment & Order on Notice of Settlement

by placing the same in a properly postpaid franked envelope addressed:

two parties listed annexed order

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Manuel Bermudez

Sworn to before me this

19th day of March, 19 76

Ralph L Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 19[illegible]

Order May 5, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S.D.N.Y.

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

72 CIV. 5031

MICROFILM
MAY

O R D E R

On April 14, 1976, an order was signed by this court in the above captioned matter. Such order had been pre-dated "March 25, 1976" by the judgment clerk of the court, and such date was not changed to reflect the fact that the order was actually signed on April 14, 1976. Accordingly, it is hereby Ordered that said order be amended nunc pro tunc to reflect the fact that the date of signature by this court was April 14, 1976.

In addition, it appears that this case has been marked closed in the clerk's office. Pursuant to paragraph 3 of the April 14, 1976 order, this case shall be reinstated to the list of open cases before this court until the new election mandated in such order has been certified in accordance with Section 402(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 482 (c).

Dated: New York, New York
May 4, 1976

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

Defendant's Notice of Appeal

#5 Def. 2897a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

W. J. USERY, Secretary of Labor :
United States Department of Labor,

Plaintiff, :

- against - : NOTICE OF APPEAL

INTERNATIONAL ORGANIZATION OF MASTERS, : 72 Civ. 5031 (CBM)
MATES AND PILOTS, INTERNATIONAL
MARITIME DIVISION, ILA, AFL-CIO, :

Defendants. :

----------x

Notice is hereby given that the International Organization of Masters, Mates and Pilots, AFL-CIO, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from all of the Judgment and Order of the Honorable Constance Baker Motley entered in this action on April 15, 1976, which Judgment and Order in substance invalidates the 1971 election of all International officers of the defendant union, International Organization of Masters, Mates and Pilots, and all the officers of the defendant union's Offshore Division, and directs that a new election under the supervision of the Secretary of Labor be conducted for all such

offices and that said new election be completed no later than December 31, 1976.

Dated: New York, New York
May 5, 1976

MARVIN SCHWARTZ

Marvin Schwartz

Attorney for Defendant,
International Organization of
Masters, Mates and Pilots,
AFL-CIO
243 Waverly Place
New York, New York 10014
691-2250

TO: Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
Attorney for Plaintiff
By: Dennison Young, Jr.
Assistant United States Attorney
Office and Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Telephone: 212 791-1969

Defendant's Undertaking for costs on Appeal

DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Southern District of New York in the

Second Circuit

72 cw 5031
(CBM)

W.J. USERY, Secretary of Labor, United States Department of Labor,
Plaintiff

vs

International Organization of Masters Mates and Pilots, International Maritime Division, ILA, AFL-CIO,
Defendants

UNDERTAKING

FOR

COSTS

FILED
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WHEREAS, a judgement and order was entered in the above entitled action on the 15th day of April, 1976, in the District Court of the United States for the Southern District of New York; and

WHEREAS, the Appellant, International Organization of Masters Mates and Pilots, International Maritime Division, ILA, AFL-CIO feeling aggrieved thereby has prosecuted its appeal to the United States Circuit Court of Appeals for the Second Circuit.

NOW, THEREFORE, UNITED STATES FIDELITY AND GUARANTY COMPANY, having an office and usual place of business at No. 88 Pine Street, City of New York, County and State of New York, hereby undertakes in the sum of TWO HUNDRED FIFTY AND 00/100 ($250.00) DOLLARS, that if the judgment or order so appealed from is affirmed or the appeal is dismissed, the Appellant, International Organization of Masters Mates and Pilots, International Maritime Division, ILA, AFL-CIO shall pay all costs awarded against its on said appeal, or such costs as the Appellate Court may award if the judgment or order be modified.

Dated, New York. May 5, 1976

UNITED STATES FIDELITY AND GUARANTY COMPANY.

By _____ Attorney-in-fact.

Patrick R. Croce

29-na

State and County of New York, ss:

On 5-5-76 before me personally came Patrick R. Croce known to me to be the Attorney-in-fact of UNITED STATES FIDELITY AND GUARANTY COMPANY, the corporation described in and which executed the above bond as surety thereon, who being by me duly sworn deposes and says, that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the above bond is the corporate seal of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that the assets of said Company, unincumbered and liable to execution, exceed its claim, debts and liabilities, of every nature whatsoever, by more than the sum of twenty-five million dollars ($25,000,000.00).

Patrick R. Croce

SWORN TO, acknowledged before me, and subscribed in my presence this 5th day of May, 1976

Denese Thompson

Notary Public, New York County.

Denese Thompson
Notary Public State of New York
No. 41-4623317
Qualified inQueens County
Commission expires 3-30-78

UNDERTAKING

SURETY:

UNITED STATES FIDELITY AND GUARANTY COMPANY

Attorney for

5-5-76

Approved as to form and sufficiency of surety.

Raymond F Burghardt

CLERK

CERTIFIED COPY

GENERAL POWER OF ATTORNEY

No. 85203 29-1a

Know all Men by these Presents:

That UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint

Kenneth C. Edgar, Andrew J. Gettings, Patrick R. Croce, Patrick G. Skahill, Elizabeth Vogel, Kerry A. Richardson and John E. Vance

of the City of New York, State of New York
its true and lawful attorneyS

for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said UNITED STATES FIDELITY AND GUARANTY COMPANY, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever anyone of the said Kenneth C. Edgar and the said Andrew J. Gettings and the said Patrick R. Croce and the said Patrick G. Skahill and the said Elizabeth Vogel and the said Kerry A. Richardson and the said John E. Vance

may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said UNITED STATES FIDELITY AND GUARANTY COMPANY has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 4th day of October, A. D. 1974

UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Signed) By Robert E. DeNike
Vice-President.

(SEAL)

(Signed) John C. Vaeth, Jr.
Assistant Secretary.

STATE OF MARYLAND, BALTIMORE CITY, } ss:

On this 4th day of October, A. D. 1974, before me personally came Robert E. DeNike, Vice-President of the UNITED STATES FIDELITY AND GUARANTY COMPANY and John C. Vaeth, Jr., Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said Robert E. DeNike and John C. Vaeth, Jr. were respectively the Vice-President and the Assistant Secretary of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so fixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first day in July, A. D. 19..78....

(SEAL) (Signed) Herbert J. Aull
Notary Public.

STATE OF MARYLAND, BALTIMORE CITY, } Sct.

I, Robert H. Bouse, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that Herbert J. Aull, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 4th day of October, A. D. 19 74

(SEAL) (Signed) Robert H. Bouse
Clerk of the Superior Court of Baltimore City.

FS 3 (9-67)

COPY OF RESOLUTION

2962a

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performances of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Richard Calder, an Assistant Secretary of the UNITED STATES FIDELITY AND GUARANTY COMPANY, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to Kenneth C. Edgar, Andrew J. Gettings, Patrick R. Croce, Patrick G. Skahill, Elizabeth Vogel, Kerry A. Richardson and John E. Vance

of New York, New York, authorizing and empowering them to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July, 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my hand and the seal of the UNITED STATES FIDELITY AND GUARANTY COMPANY on

(Date)

May 5, 1976

Richard Calder

Assistant Secretary.

Stipulation that certain Documents be Transmitted
as part of the Record on Appeal

DY,JR.:n

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2913a

U.S. DISTRICT COURT
FILED
MAY 17 1976
S. D. OF N. Y.

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

STIPULATION

72 Civ. 5031 (CBM)

C.A. 76-6076

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties in the above-captioned action that the following listed documents, which may not have been filed and do not appear to be a part of the record on appeal, may be transmitted to the United States Court of Appeals for the Second Circuit as part of the record on appeal:

Document	Index No.
Appendix to Plaintiff's Reply Memorandum	59A
Signed and Notarized Copies of the Final Pages of the O'Callaghan Deposition Transcripts	78
Signed and Notarized Copies of the Final Pages of the Lowen Deposition Transcripts	79
Exhibits Introduced at November 19 and 20, 1974 Depositions of the American Arbitration Association (Documents numbered 62 and 63)	80
Letter dated April 22, 1976 from Jaffe, Cohen & Crystal to Judge Motley.	81

Document	Index No.
Letter dated April 1, 1976 from A.U.S.A. Dennison Young, Jr. to Judge Motley.	82
Letter dated March 30, 1976 from Marvin Schwartz, Esq. to Judge Motley with counter-proposal enclosed.	83
Letter dated March 23, 1976 from Jaffe, Cohen & Crystal to Judge Motley with counter-proposal enclosed.	84
Letter dated March 1, 1976 from Marvin Schwartz, Esq. to Judge Motley with attachments.	85
Letter dated February 26, 1976 from A.U.S.A. Dennison Young, Jr. to Judge Motley with attachments.	86
Letter dated February 26, 1976 from Marvin Schwartz, Esq. to Judge Motley with attachments.	87
Letter dated January 15, 1976 from Jaffe, Cohen & Crystal to Judge Motley.	88
Letter dated December 3, 1975 from Marvin Schwartz, Esq. to Judge Motley.	89
Letter dated November 25, 1975 from A.U.S.A. Young to Judge Motley with case decisions attached.	90
Letter of July 7, 1975 from Marvin Schwartz, Esq. to Judge Motley.	91
Letter of June 25, 1975 from Marvin Schwartz, Esq. to Judge Motley.	92

Document

2975a Index No.

Letter dated March 3, 1975 from Judge Motley to A.U.S.A. Dennison Young, Jr. 93

Letter of February 12, 1975 from Judge Motley to Ernest Allen Cohen, Esq. attached to letter of February 6, 1975 from Jaffe, Cohen, Berman & Crystal to Judge Motley. 94

Letter dated February 5, 1975 from A.U.S.A. Dennison Young, Jr. to Judge Motley. 95

Letter of October 15, 1974 from A.U.S.A. Dennison Young, Jr. to Marvin Schwartz, Esq. with copy to Judge Motley. 96

Dated: New York, New York

May 17, 1976

Marvin Schwartz
MARVIN SCHWARTZ, ESQ.
(Attorney for Defendant-Appellant)

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
(Attorney for Plaintiff-Appellee)

Dennison Young, Jr.
DENNISON YOUNG, JR.
Assistant United States Attorney

Signed and Notarized copied of Final Pages of
O'Callaghan Deposition

Alma O'Callahan 1643

court reporter and work at night, we can work at night.

MR. DAVAS: Okay. We'll see you tomorrow at 12:30.

(Time noted: 5:30 P.M.)

THOMAS P. O'CALLAGHAN

Subscribed and sworn to before me this 6 day, December, 1974.

Harry Seidman
NOTARY PUBLIC

HARRY SEIDMAN
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires [illegible]

BEST COPY AVAILABLE

THE WITNESS: Mrs. Watson.

MR. YOUNG: I hope things work out.

THE WITNESS: Yes, because she is the kind of secretary you just don't replace every day. We could really depend on her.

MR. YOUNG: Any good faith effort you make in view of the circumstances, of course, we will adjust to accordingly.

(Time noted: 5 p.m.)

Subscribed and sworn to before me this 6 day of December 1974.

HARRY SEIDMAN
Notary Public, State of New York
No. 41-3587000
Certificate filed in Queens County
Commission Expires March 30, 1975

Copies of Final Pages - Lowen Deposition

1971?

A I recall very well. I said I had not had anything to do with it.

MR. DANAS: For the record, we are adjourning today's deposition at the request either of Mr. Schwartz or the deponent or both, to be continued on Wednesday, May 29th, at 2 p.m. or as soon thereafter as we can get together.

I have at this point, tentatively scheduled an argument for two o'clock.

MR. SCHWARTZ: Let me know.

MR. DANAS: I'll know the day before when we have an argument. What about Captain O'Callghan's deposition?

MR. SCHWARTZ: We will bring him back either Thursday or Friday.

MR. DANAS: That would be the 30th or 31st of May.

MR. SCHWARTZ: Also, you're going to go throug those statements?

MR. DANAS: Signed statements?

MR. SCHWARTZ: The other statement, not the signed statements.

(Time noted 3:40 p.m.)

Subscribed and sworn to before me this 19 day of November 1974.

ROBERT J. LOWEN

HARRY SEIDMAN
Notary Public, State of New York
No. 41-2587020
Certificate filed in Queens County
Commission Expires March 30, 1975

successful effort made to do this and if it is going to be done on any kind of basis to do it instead of striking each other with stipulations, then you are better off thinking of O'Callaghan for Tuesday morning.

MR. DANAS: Let us plan on Monday after meeting with the Magistrate.

MR. SCHWARTZ: I know that he is going to be around Friday and I will have to check. I will talk to you in the morning.

MR. DANAS: I agree with your statement that we ought to utilize the time to reach agreement on some of these points.

MR. SCHWARTZ: He is not available any time you want him. There's a meeting of the board of trustees on Tuesday.

MR. DANAS: This is a lawsuit and we have time limits and it is incumbent upon me to make that clear to you.

MR. SCHWARTZ: We will do that. We can't just suit the lawyer individually.

MR. DANAS: Hopefully we can do that.

(Time noted: 6:03 p.m.)

Subscribed and sworn to before me this 19 day of November 1974.

HARRY SEIDMAN
Notary Public, State of New York
No. 41-3837000
Certificate filed in Queens County
Commission Expires March 30, 1975

COPIES OF MASTER LISTS MARKED AS EXHIBITS S-1 THROUGH S-!!! INTRODUCED DURING THE NOVEMBER 19AND 20, 1974 PORTION OF THE DESPOSTION OF THE AMERICAN ARBITRATION ASSOCIATION TAKEN BY PLAINTIFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2910a

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

-v-

INTERNATIONAL ORGANIZATION OF MASTERS MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

72 Civ. 5031 (CBM)

COPIES OF MASTER LISTS MARKED AS EXHIBITS S-1 through S-111 INTRODUCED DURING THE NOVEMBER 19 AND 20, 1974 PORTION OF THE DEPOSITION OF THE AMERICAN ARBITRATION ASSOCIATION TAKEN BY PLAINTIFF

VOL #14

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Ballot outside return envelopes postmarked on September, 1971.

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415	11
419	21
446	30
449	46
454	47
461	52
493	74
494	83
505	85
529	107
544	157
549	176
550	204
566	205
575	206
578	230
607	238
625	297
627	300
636	314
659	317
662	319
663	322
667	324
671	325
672	326
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Group Index, Cont'd

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176	417
187	434
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232	549
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6363	6586
6368	6594
6370	6602
6382	6603
6385	6613
6399	6615
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6464	6658
6487	6667
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6506	6672
6512	6687
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6526	6704
6527	6706
6529	6716
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6755	6961
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6782	6970
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6801	6973
6807	6979
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6843	6999
6862	7006
6872	7012
6874	7023
6875	7029
6876	7053
6883	7056
6886	7058
6887	7059
6889	7062
6907	7064
6912	7066
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7105	7296
7112	7297
7120	7302
7125	7308
7134	7312
7135	7313
7136	7314
7138	7322
7160	dup 7329
7162	7332
7163	7340
7168	7342
7177	7344
7181	7346
7186	7349
7189	7350
7195	7362
7199	7363
7200	7364
7205	7371
7212	7377
7220	7382
7223	7384
7224	7385
7225	7390
7229	7404
7243	7410
7258	7412
7263	7414
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ORANGE ENVELOPES

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35	353
39	355
40	357
42	358
44	359
53	364
55	370
62	372
63	387
64	388
65	393
70	401
dup 75	403
dup 77	412
97	422
98	433
100	465
110	478
111	486
112	488
114	492
115	499
212	508
223	519
229	535
234	540
235	559
239	587
243	592
294	595
299	601
311	618
328	631
337	638

ORANGE

646	869
657	871
675	878
681	879
694	883
698	887
706	889
708	892
708	895
713	902
728	909
729	910
732	914
744	931
751	937
758	943
763	944
766	948
767	955
770	956
773	958
776	959
783	960
787	965
800	968
811	975
824	985
827	988
836	991
844	992
851	993
860	999
861	1003
865	1005
868	1006

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ORANGE

1010	1157
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1015	1193
1016	1205
1018	1207
1019	1209
1020	1222
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1080	1409
1081	1419
1083	1429
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1091	1448
1101	1457
1103	1463
1111	1477
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ORANGE

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82	431
87	447
107	461
114	463
152	472
165	dup 473
167	482
169	dup 495
171	528
174	543
184	561
220	dup 564
221	565
225	579
237	586
238	641
240	649
244	654
245	656
255	668
281	710
283	717
286	718
319	744
322	dup 756
823	789
335	796
339	816
377	896
392	900
393	910
394	919
409	923
412	926

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BALTIMORE

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1038	1337
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1080	1374
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1111	1411
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1163	1438
1172	1447
1193	1451
1204	1453
1206	1456
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1225	1474
1231	1475
1243	1480
1246	1493
1248	1500
1252	1507
1263	1517
1266	1523
1277	1526
1289	1537
1295	1538
1304	1540
1306	1548
1315	1571
1319	1572

2368a ©

J.F.

Galveston, Houston

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29692 Wreck
NOW

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Disp 1864
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1914
1926
1934

8-58 per
Wreck
file

1931A	2301
1938	2302
1944A	2312
1945A	2344
1955A	2363
1959A	2351
1963A	2397
1987	2409
Dup 1990	2425
2015	2434
2035	2441
2067	2456
Dup 2069	
2106	
Dup 2107	
2113	
2124	
2134	
2136	
2137	
2153	
2172	
2175	
2178	
2179	
2196	
2203	
2214	
2232	
2240	
2252	
2257	
2268	
2274	
Dup 2275	

2971a

2515A
dup 2521A
2530
2537
2568
2581
2583
2585
2611
dup 2641
2645
2660
2668
2675
2705
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2760
2761
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dup 2767
2788
2790
2807
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2972a

2866	3267
dup 2881	3268
2907	3292
dup 2912	3303
2941	3316
2952	3338
2975	3352
2980	3379
2990	3394
3018	3417
3041	3420
3051	3422
3054	3424
dup 3056	3434
3060	3437
3075	3455
3094	3461
3099	3470
3103	3474
3116	dup 3476
3140	3488
dup 3141	dup 3491
3165	3500
3177	3501
3186	3508
3196	3525
3197	3534
3211	3535
3213	3558
3323	3571
3234	3572
3235	3587
3258	3596
3259	dup 3641
3264	3751

2973a

RS ©

3658	3924
3666	3962
3670	3967
3678	3971
3680	3980
3694	3984
3706	3989
3719	3992
3729	dup 3993
3733	
3751	
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Pre-8 Amelia

4018
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4214
4210
4249
4250
4255
4273
4277
4315
4318
4337 dup
4342
4343
4384

4389
4402
4406
4455
4473
4495
4498 dup
4519 dup
4526
4553
4555
4569
4574
4602
4610
4622
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4645
4650
4652
4653
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4678
4688
4699 Dup
4702
4704
4709
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4751

BEST COPY AVAILABLE

4756
4807
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BEST COPY AVAILABLE

5004
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2977a

Phila.

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5301
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2978a

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(1) mk 11/26/74

g.f.

San Francisco

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g-68 mk 11/26/74

J. T.

San Francisco	
6684	7003
6685	7010
6688	7021
6690	7038
6694	7045
6699	7047
6705	7074
6730	7094
6762	7114 Dup
6763	7116
6770	7127
6783	7147
6793	7151
6805	7154
6827	7172
6830	7207
6856	7209
6857	7214
6859	7216
6867	7218 Dup
6870	7232
6877	7262
6894	7277
6902	7278
6903	7292
6908	7309
6920	7310
6931	7324
6932	7335
6933	7339
6948	7352
6951	7353
6975	7366
6986	7380
6987	7388

2991a

7393	7577
7394	7579
7395	7596
7397	7599
7402	7602
7409	7608
7418	7615
7421	7617
7422	7622
7425	7646
7446	7650
7447	7654
7452	7657
7466	7664
7470	7670
7475	7673
7477	7678
7487	7685
7488	7686
7493	7687
7494 Dup.	7702
7499	7705
7504	
7512	
7515	
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2983a

greens

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44
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110
113
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116
dup 129
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153
168
169
170
175
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177
dup 179
186
188
201
219
220
229
250
257
271
276
303
dup 314
342
348
374

378
413
459
478
476
552

2984a

orange

16	843
dup 81	845
203	850
209	856
211	876
222	877
231	898
301	901
302	906
320	911
327	913
339	919
348	927
354	932
398	934
400	935
404	940
409	945
418	967
442	969
dup 451	977
453	980
459	983
460	1007
468	1009
473	1022
526	1025
534	1028
600	1065
624	1099
716	1100
780	1108
786	1161
dup 792	1215
805	1221

range

1227
1249
1272
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1300
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2386a

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	11
	38
	52
	68
	125
	138
	158
skip	192
	199
	233
	239
	249
	262
	271
skip	287
	292
skip	300
	304
	377
skip	446
	471
	478
	485
	502
	521
	551
	581
skip	599
	609
	660
skip	628
	999
	969
	722

skip 740
751
759

832
358
866
869
889
899
911
920
921
947
960
983
998 DUP
1 066
1 023

1043	DUP.
1067	
1092	
1096	
1105	
1110	
1130	
1132	DUP.
1149	DUP.
1153	
1160	
1171	
1177	
1216	
1217	DUP.
1235	
1239	
1279	
1341	
1344	DUP.
1345	
1348	
1370	
1373	
1383	
1385	DUP.
1398	
1420	
1426	
1476	
1477	
1484	
1491	
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1507	DUP.
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1570	DUP.
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1579	DUP.
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1610	DUP.
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1660	
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1680	
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1694	DUP.
1711	
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2989a

1733
dup 1737 A
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1836
dup 1851
1868
1909
1913
1918

BEST COPY AVAILABLE

1969
1972
2013
2014
2036
2045
2077
2080 Dup.
2099
2110
2115
2126
2159
2186
2189 Dup.
2217
2225 Dup.
2249
2254
2280
2288
2416
2418
2420
2440
2442
2444
2455
2457
2484

2513A
2515
2541
2579 Dub.
2584
2626
2627
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2709
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23822

(1)

	2863
dup	2899
	2920
	2938
	2942
dup	2944
	2950
	2951
	2955
	2965
	2978
	2979
	2989
	3008
	3022
dup	3046
	3062
	3069
	3071
dup	3083
dup	3102
	3149
	3151
dup	3143
	3159
	3173
	3199
	3217
	3219
	3242
	3247
	3280
	3281
dup	3285
dup	3296

	3306
	3307
	3309
	3319
	3336
	3340
	3384
	3401
	3404
	3443
	3450
	3477
	3498
	3515
dup	3519
	3522
	3538
	3542
	3553
	3557
	3560
	3568
	3589
	3611
	3665
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	3685
	3690
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	3793
	3802
	3806
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2303a

3820
3848
dup 3914
dup 3920
dup 3925
3932
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3970
3994
dup 3996
4003
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4101
4160
4168
4179
4183
dup 4191
4190
4213
4241
4254
4291
4305
4307
4336
4374
4334
4314
dup 4424
4429
4445

dup 4459
4471
4486
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4548
dup 4608
4635
dup 4678
4663
4667
4670
4676
4677
4680
4685
4698
dup 4706A
4749
dup 4779
4792
4813
dup 4874
4833
4846
4869
4877
4888
4896
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4961

2995a

5009
5036
5077
5102
5119 Dups.
5126 Dups.
5128
5148
5192
5205
5234

5262
5297
5329
5336
5368
5415
5427
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5472
5486
5563
5573
5592
5603
5633 Dup.
5650
5694
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5741
5742 Dup.
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5794
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2997a

D. B.

99	18	
99	22	
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99	97	
99	23	DUP.

2398a

S. B.

CWC

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5 935
5 942
5 970
5 973 DUP.

B-87 pd

11/20/74

DR

6519
6532
6538
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6582
6589
6598
6605 Dup
6621
6711
6723
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7015		7642
7030		7658
7069		7713
7087		7724
7126		7746
7129		7765
7149	TRIP	7777
7152		7799
7158		7820
7194		7825
7211		7846
7222		7867
7236		7874
7250		7877
7254		7881
7255		7883
7257		7922
7259		7929
7319		7973
7325		7979
7365		7984
7381		7892
7386		7961
7401		7990
7408		7993
7461		
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3992a

(1) OK White
J. T.

Green
65
106
112
182
198
221
275
277
359
568
569

B-91 ml
11/20/74
TK

Orange

Orange
48
49
59
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101
397
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406
416
562
691
717
727
731
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761
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884
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997
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1764

BEST COPY AVAILABLE

Unopened envelopes	containing ballots
140	3304
342	3321
617	3410
747	3449
781	3454
804	3459
833	3518
836	3581
862	3604
878	3734
888	3826
991	3830
996	3879
1031 Dup.	3930
1406	3961
1630	4222
1777	4279
1795	4449
1849	4507
1876	4522
1931	4657
1957	4706
2185 Dup.	4717
2256 Dup.	4761
2394	4767
2415	4876
2879	5530
2991	~~5574~~ 5574
2900	5638
2974	5658
3020	6366
3032	6413 Dup.
3063	6429
3226	6555
3231	~~6593~~

6612
6673
7090
7389
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123	
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256	
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334	
357	
372	
376	
386	
451	
452	
483	
509	
541	
542	Dup
589	
591	Dup
619	
630	
670	
691	
777	

802	
805	
809	
825	
829	
813	
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3377a

1001
1005
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1603
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1663
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1675
1744
1746
1752A
1758 Dup
1767
1783
1803
1811
1840
1860
1942
1944
1945
1947
1951A
1952
1953A
1954A
1955
1960A
1965A
1969.A
1971
1973
1992
1995 Dup
1996

2004	2248
2009	2265
2010	2259
2019	2271
2030	2273
2038	2277
2040	2281
2044	2282
2054	2287
2060	2290
2068	2292
2079	2299
2101	2318
2102	2319
2111	2322
2119	2334
2122	2339
2127	2348
2139	2354
2142	2368
2148	2380
2149	2390
2150	2402
2153	2403
2201	2417
2206	2431
2213	2445
2220	2458
2226	2460
2247	2467

2481
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3319a

① L. B.

8-99

2865	3287
2902	3290
2929	3312
2930	3326 Duf.
2934	3329
2935	3330
2939	3334
2957	3344
2963	3349
2967	3356
2993	3363
2993	3365
3047	3374
3094	3372
3088	3405
3114	3406
3117	3419
3120	3436
3144	3444
3152	3448
3168	3451
3174	3452
3183	3453
3202	3499
3203	3505
3209	3523
3249	3528
3251	3539
3255	3544
3284	3546

3241a

3556	Dup.
3575	Dup.
3592	
3619	
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3695	
3703	Dup.
3704	
3711	
3717	Dup.
3718	
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3212a

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3213a

4102	
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4236	
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4282	
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4298	Dup
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4382	
4388	
4393	Dup
4399	
4426	
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4443	
4464	Dup

4456	
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4605	
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4664	
4671	
4679	
4703	
4713	
4714	
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4730	
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4741	Dup
4763	

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~~4844~~ 4855
4861
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3315a

	5491
	5494
	5496
	5505
	5532
	5548
dup	5521
	5529
	5535
	5565
	5580
	5599
	5604
	5629
	5636
	5641
	5652
	5654
	5655
	5751
	5789
	5799
	5805
	5817
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	5840
	5853
	5906
	5935
	5982

	5006
	5055
	5056
	5070
	5085
	5165
	5180
	5242
dup	5264
	5268
	5272
	5253
	5304
	5307
	5309
	5316
	5335
dup	5343
	5389
	5390
dup	5413
	5436
	5452
	5454
	5455
	5459
	5461
	5467
	5470
	5479
	5482
	5484

3316a

8-105 ind 11/20/14

OK 11/24/14

6001
6004
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Letter dated April 22, 1976 to Judge Motley

File 3322a

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April 22, 1976

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Usery v. International Organization
of Masters, Mates and Pilots
No: 72 Civ. 5031 (CBM)

Dear Judge Motley:

This letter is written in response to the letter dated April 1, 1976 submitted by Mr. Young with respect to the proposed judgments and counterjudgments in the above-captioned case. We believe that the significance of the issues involved warrant an opportunity for the parties to orally present their views concerning the form and provisions of the judgment to be entered in accordance with your Honor's Decision.

It appears that the plaintiff's position has modified with regard to the issue of applicability of the defendant Union's Constitution and that this represents a constructive beginning. Nonetheless, the plaintiff's position, vis-a-vis attempting to fix a thoroughly unrealistic deadline for conclusion of the election procedures remains adamant and therefore necessarily requires a response.

/...

The plaintiff appears to fail to comprehend that the nature of the International Organization of Masters, Mates & Pilots makes the conduct of elections and referenda extremely costly and time consuming. The nature of the Union is such that substantial numbers of members are at any given time widely dispersed throughout the world and thus, not capable of attending meetings or casting ballots at one or several ballot boxes during a limited time period. Thus, the normal method of conducting elections is totally unavailable to the International Organization of Masters, Mates & Pilots, since it would disenfranchise very sizable numbers of members through absolutely no fault of their own. In order to conduct an election or a referenda it is therefore necessary to use the mails by sending such ballots or referenda to the home addresses of the members and hope that such ballots will be transmitted to those members who are at sea or will be received by those members who return from sea duty during the course of the election or referenda. In order to accomplish this it is basic that the election or referenda period be extended for a considerable period of time. Thus, the longer that the election continues, the more likely it is that the largest possible number of members will actually receive their ballots and be able to vote. The problem posed by an unreasistic deadline under the circumstances of the International Organization of Masters, Mates & Pilots is twofold:

1. Although all parties now appear to agree that the election must be conducted pursuant to the Union Constitution, the plaintiff has challenged the legality of that aspect of the Constitution which provides that the International President, Vice President and Secretary-Treasurer are also the president, vice president and secretary-treasurer of each division of the Union. This Court has not passed upon this issue. It is clear, however, that the decision on this issue would vitally effect the membership of the Union in the exercise of their rights. Thus, if the provision were held to be illegal, the membership should have the right, by referendum to choose between the various alternatives which might be legally available to them. The

/...

Constitution of the Union should not be changed unilaterally by the Secretary of Labor. It is clear that the decision of various union members concerning whether or not to seek election and if so, what office to seek election to depends to a large extent on what offices exist and what functions each office is intended to fulfill. Moreover, the existing Constitution of the Union is presently the subject of a Court mandated referendum based upon procedures utilized in connection with its initial adoption. Pending the outcome of that referendum, the constitutional status of the Union is in a state of uncertainty.

2. The issue of mootness which has heretofore been decided by this Court has never previously been decided in a case where the results of the subsequent election differed dramatically from the results of the prior election except where restrictive elegibility provisions which invalidated the prior election were similarly operative in the subsequent election. Thus, it appears that this case involved an issue of first impression - whether mootness can ever apply as a result of a subsequent election. This is an extremely significant issue which is likely to receive serious consideration through the appellate process. Fixing an unrealistic deadline for the election might force the Union to engage in an extremely costly and time consuming election which the appellate courts may determine was totally uncalled for. If the election was held, however, at the time of the next scheduled Union election, its results would be binding upon the Union and the Union would be saved the burden and expense of conducting three separate elections within a three year period.

It is respectfully suggested that the position taken by the plaintiff is so unrealistic as to be punative in nature to the members of the Union and to the democratic process which the Statute was intended to preserve.

Respectfully,

JAFFE COHEN & CRYSTAL

By: _____
Ernest Allen Cohen
Attorneys for Amici Curae
Frank T. Scavo and
Timothy Brown

EAC:lcs
cc: Dennison Young, Jr., Esq.
Marvin Schwartz, Esq.
Frank T. Scavo
Timothy Brown

Letter dated April 1, 1976 to Judge Motley

United States Department of Justice

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

DY:ee

n-1743

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

April 1, 1976

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Usery v. International Organization of Masters Mates and Pilots
72 Civ. 5031 (CBM)

Dear Judge Motley:

This is in response to Mr. Schwartz's letter of March 30, 1976 and Mr. Cohen's letter of March 23, 1976 and both of their counterjudgments and orders.

At the outset we face the somewhat anomolous situation of replying to the defendant union's position and the amicus position of the defendant union's president* which is at some variance with the position of the defendant union itself. Notwithstanding our doubts about the propriety of the amici curiae submitting a counterjudgment in this case, we nevertheless wish to comment on the changes both counter-proposals would make in the Government's proposed judgment.

* Mr. Cohen, as noted by his letter and counterproposal now represents only Mr. Scavo, an insurgent and victorious presidential candidate in 1974, and Mr. Brown, an insurgent and defeated Secretary Treasurer candidate in 1974. While at one time Mr. Cohen represented Gerald Johnson as well, as insurgent and victorious Executive Vice-Presidential candidate in 1974, that no longer seems to be the case.

First, the union asks the court to add to the second paragraph of the Government's proposed judgment language which would have the new election run in accordance with either the provisions of the International's Constitution and Offshore Division's Bylaws in effect in 1971 or those in effect in 1974. The union leaves it to the Court to select which provisions would be most appropriate. The amici curiae request that language be added to the second paragraph merely stating that the supervised election be conducted in accordance with the union's Constitution to the extent that Constitution is not inconsistent with the Labor Management Reporting and Disclosure Act ("Act"). We submit that the proposals of both the union and the amici are inappropriate.

Section 402(c) of the Act, 29 U.S.C. § 482(c), specifically directs that the new supervised election is to be conducted "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization." This provision attempts to ensure that the new election will be guided by the provisions of the organization's constitution and bylaws in effect at the time the new election process begins, except for those provisions which are not lawful or practicable (i.e. do not conform to the requirements of Title IV the Act). Accordingly the provisions of the IOMM&P's Constitution and the Offshore Division's Bylaws now in effect, except for those particular provisions which the Secretary determines are not lawful or practical, will govern the new election.* The Court need not refer the election process back to provisions effective at earlier periods. Only a fair, lawful new election need be assured and this will be accomplished with minimal disruption of the union's normal processes if the provisions of the Constitution and Bylaws now in effect govern and, of course, if the election is supervised by the Secretary. Thus, if any language is to be

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* Since the new election process will begin once the Court signs a Judgment ordering the new election, the provisions of the constitution and bylaws in effect that day should guide the election.

added to the Government's second paragraph, it should track the words of the law and indicate that with the exception of unlawful or impracticable provisions, the provisions of the Constitution and Bylaws operative at the time the Judgment is signed will govern the new election.*

This alternative, we believe, adds no more, however, than what Section 402(c) of the Act provides and it is for this reason we feel the language suggested by the amici, too, is, at best, unnecessary. In addition it is noted that the actual language proposed by the amici deviates from the language of the Act. If no more is intended by their language than to ensure that the new election will be conducted, so far as lawful and practicable, in conformity with the Constitution and Bylaws, then that notion is already is already accomplished by conducting the election "in accordance with Section 402(c) ..." which language is already included in paragraph 2.

Second, the union and the amici curiae propose that the supervised election be conducted at the time of the Union's next regularly scheduled election which in this case would be from the middle to the end of 1977. To allow the union or the amici to dictate when the new election is to be held would sharply curtail the supervisory authority of the Secretary, a circumstance not contemplated nor permitted by the Act. As then Circuit Judge Stevens pointed out in Brennan v. Local 551, United A., A. & A. Imp. Wkers. of A. Inc., 486 F.2d 6, 7 (7th Cir. 1973) "[T]he Secretary's power to supervise an election required by a court order clearly includes the power to set the date of that

---

* If the Court chooses this alternative, we recommend that the following be inserted in paragraph 2 of the Government's proposal on line 6 between the "semi-colon" and the word "and": "said new election, in compliance with Section 402(c) of the Labor Management Reporting and Disclosure Act, shall be conducted, so far as lawful and practicable, in compliance with the provisions of the defendant union's Constitution and the defendant union's Offshore Division's By-Laws operative at the time this Judgment and Order are signed;".

election".*

The Government's proposed Judgment sets a deadline of December 31, 1976 for completion of the new election... nearly nine months in the future. This allows more than ample time for the Secretary to consult with and consider the views of the union and other interested persons with respect to setting the procedure and the dates for nominations, balloting and all other aspects of the election process. But at the same time the deadline date puts the union leadership on notice that delay in conducting the new election will not be tolerated.

The union's and amici's proposal would undermine the very purpose for which supervised elections are needed, i.e. to rectify for the public interest an improperly conducted election as quickly as possible and to "guard against a multiplicity of influences which the results of a tainted election may have on subsequent union activities (Court's Opinion, p. 12)". Neither the union nor the amici should be permitted to delay a supervised election. Incumbants - whether elected during the tainted election or at a subsequent unsupervised election - should not be permitted to prolong their terms more than is absolutely necessary. The day to day decisions of the union leadership should be given, as soon as possible, to those who, in the scheme of the Act, are properly elected during a supervised election. Accordingly, we strongly oppose any proposal that would keep the supervised election from being completed before the end of this year.*

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* In Point VII of the Government's reply memorandum submitted in support of our summary judgment motion we elaborate more fully on the scope of supervision.

* Assuming balloting were completed by December 31, 1976, this would merely advance by one year the regularly scheduled election timing for the union. The union thereafter could adjust its future election scheduling appropriately if it wishes to have an election every three years.

Third, the union in paragraph 2 of Mr. Schwartz's letter queries the status of that issue concerning the right of the three top International officers to automatically assume the three top positions of the fully formed divisions, including the Offshore Division, with respect to both the supervisory role of the Secretary and the Secretary's case involving the 1974 election. In paragraph 3 of its counterjudgment the union leaves it to the Court, however, to determine if that issue is moot.

We believe strongly that paragraph 3 of the union's counterjudgment should not be included in the final Judgment and Order.

Contrary to what Mr. Schwartz says in his letter, the Court has not yet declared the 1974 election case moot and we believe that that decision is entirely proper. See Court's Opinion, footnote 2. Once new officers are installed, the 1974 election itself may be moot; but only after the supervised new election has been completed and the results approved by the Court will the lawsuit arising out of the 1974 election and the issues raised therein become moot. By then the issue will have been negated, for the new election will not be permitted to go forward unless all the election procedures to be followed are "lawful". As we have explained in Point VII of our Reply Memorandum in support of our summary judgment motion, the Secretary does not consider the scheme permitting the three International officers to become the three top officers of the Divisions without a separate election therefor to be in conformity with the law. And as part of his supervisory authority he will require that the union present some other acceptable plan.* In sum, this "issue" is alive in the supervisory process and until this illegal scheme has been corrected, the 1974 election case will not be considered moot.

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* While the Secretary will consult with the union and interested persons and consider any proposals submitted, such deliberations will not be permitted to delay the election process beyond the December 31, 1976 deadline.

Fourth, the union requests the Court to order that the Secretary's supervision of the new election be considered a suitable substitute for those provisions in the IOMM&P's Constitution and Offshore Division By-Laws mandating that an outside independent agency conduct the union's election. Again, the Secretary strongly objects to this idea.

It is normal procedure to allow an independent agency, in such instance as this, to perform the mechanics of conducting an election: preparing and mailing the ballots, mailing the campaign literature, checking voting eligibility, tallying the vote, and so forth. The Secretary after determining what is to be done and how that is to be accomplished, then ensures that it is being done correctly. It is not for the Department of Labor to perform each of the chores. The Department merely supervises. The limited staff of the Department's Labor Management Services Administration - that unit handling election matters, among other things - could not possibly perform all its tasks if it were obliged to handle every aspect of a court ordered election. Indeed the staff in the New York Area Office already is supervising or preparing to supervise two other elections and has at least four new election cases in the investigative stages, not to mention the time they spend on embezzlement cases, delinquent reportings and the other normal functions of their jobs.

An independent agency is called for by the Constitution and By-Laws and the union should be compelled to abide by its own rules. That it may be expensive is no excuse. Certainly the Government should not be held for the cost of correcting a wrong committed by the union itself.

Fifth, the amici curiae propose in Mr. Cohen's letter that the judgment explicitly state that the present union officers remain in office pending certification of the results of the supervised election. In their proposed judgment, however, they suggest that the present officers stay in office "pending the completion of such [new] election" (see their paragraph 2). It is thus difficult to fathom just when the amici propose newly elected officers should be installed. After the tallying of the ballots? Once the independent agency certifies the results? Once the Secretary certifies the results? Or once the Court ratifies the results of the new election?

It is the position of the Department of Labor that the scope of the Secretary's supervisory authority normally covers all aspects of the election process, including the nominations, the elections and the installation of officers. After the election is completed, the Secretary determines when officers are to assume office, and he will set a schedule for their installation conforming as nearly as may be appropriate with the requirements of the union's constitution. After the Secretary has determined that the election process - including the installation of officers - has been conducted in accordance with the requirements of the Act, he then certifies the results to the Court, i.e. reports to the Court that all - including the installation of officers - has been completed properly. It is at that point up to the Court to enter a decree declaring the installed persons to be the officers of the union. See 29 U.S.C. §482(c). Depending on circumstances that may develop, however, it may be appropriate to delay the installation of officers. If there are charges that the new election has not been conducted lawfully, for example, the Secretary should have the flexibility to delay the installation of officers pending an investigation of those charges. On the other hand even if charges are filed, it may be that delay of installation of new officers is not warranted. This depends on the facts that arise. To dictate now what the Secretary should do would accordingly be premature.

We thus recommend that the language proposed by the amici be deleted altogether. The language now in the judgment proposed by the Government subsumes the notion that supervision includes the right to determine the appropriate date for installation of officers and that should be sufficient. It should also be noted that a determination now as to precisely when the new officers should assume office may prove unnecessary. Facts may never develop which would require the Court to rule on this issue. If they do, however, there will be time enough for any concerned person to apply to the Court for a proper determination at that time. The Court need not concern itself with this problem presently.*

*We request an opportunity to be heard further if the Court wishes to include language in the judgment on this issue.

Sixth, the amici curiae propose that the enforcement of the judgment be stayed pending appeal. In view of the fact that Section 402(d) of the Act, 29 U.S.C. § 482(d), explicitly prohibits a stay of an order directing an election, this proposal must be rejected.

In conclusion, we submit that the Government's proposed judgment is both consistent with the Act and the Court's opinion. Accordingly, we respectfully request the Court to accept the form of our Judgment.

Respectfully,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
DENNISON YOUNG, JR.
Assistant United States Attorney
Telephone: (212) 791-1969

cc: Marvin Schwartz, Esq.
243 Waverly Place
New York, New York 10014

Ernest Allen Cohen, Esq.
Jaffe Cohen & Crystal
275 Seventh Avenue
New York, New York 10001

Letter dated March 30, 1976 to Judge Motley

3933a

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MARVIN SCHWARTZ
BURTON M. EPSTEIN

(212) 691-2250

March 30, 1976

Hon. Constance Baker Motley
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Hodgson v. IOMM&P
72 Civ. 5031 (CBM)

Dear Judge Motley:

I am enclosing a copy of defendant's Counter-Proposal for your Judgment and Order and I would like to take this opportunity to explain certain questions which should be resolved in the Judgment and Order and which are not resolved by the Secretary of Labor's proposal.

1. Your Opinion advises that the 1971 election should be rerun. Under the current Constitution and By-Laws which have been in effect since 1970, the By-Law provisions governing the 1971 election were different from those governing the 1974 election and all subsequent elections. In the 1971 election only (the "transitional"election), the members of former locals voted for the officials in that port. Thus, for example, Local 88 members, the New York Local, were the only members permitted to be candidates for and to vote for the Port Agent and Assistant Port Agents in the Port of New York. In the 1974 election, under

the same current By-Laws, the election for all Port Agents and Assistant Port Agents was conducted on a national basis. Thus, in 1974, all of the members of the Offshore Division (subject to the minimum qualifications requirements) were eligible to run for office in any port and they also voted for the Port Agents and Assistant Port Agents in New York as well as in all other ports.

As you can see, part of the scheme of the new Constitution and By-Laws that were adopted in 1970 was to provide for a transition period with regard to the scope of the voting. It is my belief that the Order should reflect whether or not the 1971 election is going to be rerun under the 1971 rules or if it is going to be rerun under the 1974 rules.

2. In your Decision you advised that the 1974 election challenges are now moot. However, you ruled only on the issue of the "newspaper". The 1974 challenges are based solely on the right of the three International Officials to serve as fiscal and executive officers of the fully formed divisions. Your Opinion in no way addressed itself to that issue. However, in my conversation with Stuart Parker, Esq., Assistant U.S. Attorney in charge of that case, he assumes that the Department of Labor will have the right to make such a decision as part of their general authority under the Order granting them the right to supervise the 1971 election.

3. The expense to the Union to conduct the 1974 election under the auspices of the American Arbitration Association was enormous. I would hope that your Order would provide that the supervision of the rerun of the 1971 election by the Department of Labor would eliminate the necessity for any participation by the American Arbitration Association or any other independent agency. Specifically, the Union's Constitution requires supervision by an independent agency and it would seem to me that that obligation is fulfilled when the Secretary of Labor supervises a new election and if your Order could so provide, I would assume hopefully that we would have no challenge on that score from any of the members.

We will make application to the Court of Appeals for an expedited Appeal and I would hope that we would obtain the cooperation of the Department of Labor in this matter so that the application can be made within 10 days or so of the signing of the Order. Also under those circumstances, I hope that the Order would be as specific as possible so that the case can be presented in reasonably clear focus to the Court of Appeals.

Respectfully yours,

Marvin Schwartz

MARVIN SCHWARTZ

MS:eml
CC: Dennison Young, Jr., Esq.
Ernest Allen Cohen, Esq.

Proposed Counter - Judgement And Order

Attached to Letter Dated March 30, 1976 to Judge Motley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

W.J. USERY, Secretary of Labor,
United States Department of Labor,

Plaintiff,

-v-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

----------x

JUDGMENT AND ORDER

72 Civ. 5031 (CBM)

The above action having been brought by the Secretary of Labor of the United States Department of Labor, (the "Secretary") pursuant to Section 402 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482, seeking to void the 1971 election of all International officers of the defendant union, International Organization of Masters, Mates and Pilots, and all the officers of the defendant union's Offshore Division and to have a new election for those positions ordered conducted under the supervision of the Secretary and

The Secretary having moved for summary judgment on the issues involved herein, and

The Court on March 17, 1976 having handed down a Memorandum Opinion granting summary judgment to the plaintiff, Secretary of Labor,

NOW, on motion of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for plaintiff herein, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The 1971 election of all International officers of the defendant Union, International Organization of Masters, Mates and Pilots, and all the officers of the defendant Union's Offshore Division is hereby declared void; and

2. A new election under the supervision of the Secretary of Labor shall be conducted for all International Officers of the defendant union and all officers of the defendant Union's Offshore Division in accordance with the International Constitution and the Offshore Division By-Laws as they existed in _____ (the date 1971 or 1974 should be inserted as clarification of the Court's decision and as is amplified in the attached letter); and in accordance with Section 402(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482(c); and

3. This Order for a new election (does) (does not) moot the issue with regard to the International officers' status as International executive and fiscal officers of the fully formed Offshore Division; and

4. The said new election under the supervision of the Secretary of Labor shall be conducted in accordance with the time schedule for the next regularly scheduled election in 1977 as is provided in the International Constitution and Offshore Division By-Laws.

5. The supervision of the new election by the Secretary of Labor shall fulfill the requirement set forth in the International Constitution and Offshore Division By-Laws which require supervision of the election of officers by an impartial balloting agency; and

6. The Court shall retain jurisdiction over this matter until said new election has been certified in accordance with Section 402(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482(c).

CONSTANCE BAKER MOTELY
United States District Judge

Dated; New York, New York
April , 1976

Judgment entered this

day of , 1976.

Clerk

Letter dated March 23, 1976 to Motley, J.

JAFFE COHEN & CRYSTAL
275 SEVENTH AVENUE, NEW YORK, N. Y. 10001
TELEPHONE: 691-1200
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RECEIVED
MAR 23 1976
JUDGE MOTLEY'S CHAMBERS

March 23, 1976

Honorable Constance Baker Motley
United States District Judge
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Re: Usery v. International Organization of Masters, Mates and Pilots
72 Civ. 5031

Dear Judge Motley:

Enclosed is a proposed Counterjudgement and Order, together with Notice of Settlement. The proposed Counterjudgement and Order differs from the proposed Judgement and Order submitted by Plaintiff only in the following respects:

1. The supervised election is required to be conducted in accordance with the Constitution of the Union to the extent that the same is not inconsistant with the Statute.

2. The supervised election is required to be conducted at the time that the next regularly scheduled election would be conducted under the Constitution.

3. The present officers of the Union remain in office for all purposes pending the certification of the results of the supervised election.

/...

4. A stay is provided pending appeal.

The amici parties respectfully believe that the proposed modifications fully vindicate the concerns of the plaintiff, while avoiding wholly unwarranted abuse of the rights of union members and wholly unwarranted disruption of the Union's functions. In view of the unique nature of the instant case, being the only matter ever decided where an intervening election resulted in the election of parties in no way tainted by the misconduct in a prior election and where the Court has made no finding concerning any alleged illegality of the Union Constitutional process of election, it would appear appropriate to provide the Union with the opportunity of obtaining a review of the Decision.

In view of the significant consequences relating to the differences between the proposed Judgement and Order submitted by Plaintiff and the proposed Counterjudgement and Order submitted by the amici parties, the amici parties respectfully request the opportunity for oral argument of this matter, should the Court deem it helpful.

Respectfully yours,

JAFFE COHEN & CRYSTAL,
Attorneys for Amici Curae
Frank T. Scavo and
Timothy Brown

By: E Allen Cohen
Ernest Allen Cohen

EAC:lcs

cc: Dennison Young, Jr., Esq.
Marvin Schwartz, Esq.
Frank T. Scavo
Timothy Brown

Notice of Settlement

And

Proposed Counter - Judgement And Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

NOTICE OF SETTLEMENT

72 Civ. 5031 (CBM)

S I R S :

PLEASE TAKE NOTICE that the within Proposed Counter-Judgment and Order will be presented for settlement and signature before the Honorable Constance Baker Motley, United States District Judge, Southern District of New York, at the United States Courthouse, Foley Square, New York, New York on April 1, 1976, or as soon thereafter as counsel can be heard.

Dated: New York, New York
March 23, 1976

Yours, etc.

JAFFE COHEN & CRYSTAL

By: _____
Ernest Allen Cohen
Attorneys for Amici Curae
Frank T. Scavo and Timothy Brown
275 Seventh Avenue
New York, New York 10001

To: Dennison Young, Jr.
Assistant U.S. Attorney
Attorney for Plaintiff
One St. Andrew's Plaza
New York, New York 10007

Marvin Schwartz, P.C.
Attorneys for Defendant
243 Waverly Place
New York, New York 10014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3042a

W. J. USERY, Secretary of Labor, United States Department of Labor, Plaintiff, -against- INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO, Defendants.	PROPOSED COUNTER-JUDGMENT & ORDER 72 Civ. 5031 (CBM)

The within action having been brought by the Secretary of Labor of the United States Department of Labor, (the "Secretary") pursuant to Section 402 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482, seeking to void the 1971 election of all International officers of the defendant union, International Organization of Masters, Mates and Pilots, and all of the officers of the defendant union's Offshore Division and to have a new election for those positions ordered conducted under the supervision of the Secretary, and;

The Secretary having moved for summary judgment on the issues involved herein, and;

The Court on March 17, 1976 having handed down a Memorandum Opinion granting summary judgment to the plaintiff, Secretary of Labor,

NOW, on motion of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for plaintiff herein, it is hereby

ORDERED, ADJUDGED AND DECREED that: 3043a

(1) the 1971 election of all International officers of the defendant union, International Organization of Masters, Mates and Pilots, and all the officers of the defendant union's Offshore Division is hereby declared void; and

(2) a new election under the supervision of the Secretary of Labor shall be conducted for all International officers of the defendant union and all officers of the defendant union's Offshore Division in accordance with Section 402(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482(c) and the Constitution of the defendant union to the extent that the same is not inconsistant therewith; and said new election shall be conducted in accordance with the time schedule provided in said Constitution and pending the completion of such election, all officers of the defendant union and of the defendant union's Offshore Division shall continue in office; and

(3) enforcement of the provisions hereof shall be stayed for the purposes of permitting defendant union to appeal from any portion of this order. In the event, however that Notice of Appeal shall not be filed within thirty days of the date of service of a copy of this order upon counsel for defendant union, then this stay shall be automatically vacated;

(4) in the event that Notice of Appeal has not been filed within thirty days of the service of a copy of this order, then this Court shall retain jurisdiction over this matter until said

new election has been certified in accordance with Section 402(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §482(c).

Dated: New York, New York
1976

CONSTANCE BAKER MOTLEY
United States District Judge

Judgment entered this
day of , 1976

Clerk

AFFIDAVIT OF SERVICE BY MAIL

3045a

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LYNN STEINSEIFER, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at New York, New York. On March 23, 1976, deponent served the within proposed Counterjudgment and Order upon the following:

Robert B. Fiske, Jr.
Dennison Young, Jr.
U.S. Attorneys
One St. Andrew's Plaza
New York, New York 10007

Marvin Schwartz, P.C.
Burton M. Epstein
243 Waverly Place
New York, New York 10014

the addresses designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York

Lynn Steinseifer

Sworn to before me on
March 23, 1976

ALLEN B. BRESLOW
Notary Public, State of New York
No. 30-5447[illegible]
Qualified in Nassau County
Commission Expires March 30, 1975

Letter dated March 1, 1976 to Motley, J.

3046a

LAW OFFICES
MARVIN SCHWARTZ, P. C.
243 WAVERLY PLACE
NEW YORK, N. Y. 10014

MARVIN SCHWARTZ
BURTON M. EPSTEIN

(212) 691-2250

March 1, 1976

Hon. Constance Baker Motley
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

re: Hodgson v. IOMM&P
72 Civ. 5031

Dear Judge Motley:

With further reference to my letter of February 26, 1976, the Court of Appeals held on Thursday, February 26, that Judge Knapp's findings were not "clearly erroneous" and affirmed his judgment. A copy of that judgment is attached hereto.

Very truly yours,

Marvin Schwartz

MARVIN SCHWARTZ

MS:eml

Enc.

CC: Dennison Young, Esq.

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RECEIVED
1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs,

-against-

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer or WILLIAM M. CALDWELL, as Vice President of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendants.

----------x

70 Civ. 1279 WK

JUDGMENT

This case was tried on January 8 and 9, 1973, before the Court sitting without a jury. Following presentation of the plaintiff's case, on motion of defendants the case was dismissed. Upon appeal to the United States Court of Appeals for the Second Circuit, the dismissal was reversed and the cause remanded for further proceedings. Trial was resumed on July 2, 1975 and the case completed. Now, upon consideration of the evidence, and upon consideration of the arguments submitted orally and in writing

basic and fundamental changes in the structure of the union have taken place, and in the exercise of the equitable powers and jurisdiction of this Court, the following remedy be carried out:

(1) The Constitution that was proposed for adoption in the said 1970 referendum, as amended to date, hereinafter referred to as the "present Constitution", together with the existing Constitutions and/or By-Laws of the Union's subordinate bodies, shall, as so amended and as may in the future be amended, remain in force for a period of one year from the date of entry of this judgment; and

(2) The defendants shall promptly cause the said present Constitution to be sent out to defendants' membership for approval on a "yes" or "no" vote, upon a ballot in the form annexed hereto as Schedule "A"; and

(3) In the course of such referendum, the plaintiffs and other members opposed to adoption of the present Constitution shall be given a fair and reasonable opportunity to express their views concerning the same to their fellow members and to have their views published in the official newspaper of defendants, in conformity with the provisions of the present Constitution with respect thereto; and

(4) In the event that the membership approves the present Constitution, the same shall continue to remain in force and effect, as amended and as it may be amended together with the existing Constitutions and/or By-Laws

of the Union's subordinate bodies, and this case shall be thereupon ended subject to application by plaintiffs and/or other members of defendant Union challenging the fairness of the referendum or of its procedures and to further order of this Court upon any such application; and

(5) In the event that the membership disapproves or fails to approve the present Constitution, then the defendants shall promptly convene a special Constitutional Convention which shall draft a new proposed Constitution, and the defendants shall submit the same to the membership for approval in a second referendum vote, also on a "yes" or "no" basis; and

(6) In the event that, in such second referendum vote, the membership shall approve the new proposed Constitution, then upon the expiration of one year from the entry of this judgment, or one month from the completion of such referendum, whichever first occurs, the new proposed Constitution shall come into force and effect and the existing Constitutions and/or By-Laws of all of the Union's subordinate bodies shall continue to remain in full force and effect, but shall be deemed to be amended pro tanto, to conform to the provisions of such newly ratified Constitution; and

(7) In the event that the membership shall not, within one year from the entry of this Judgment, have approved in referendum vote as above set forth, either the present Constitution or the proposed new Constitution,

or shall, having disapproved or failed to approve the present Constitution, disapprove the proposed new Constitution, then, either one month after disapproval of the proposed new Constitution or one year following entry of this Judgment, whichever may sooner occur, the Constitution and the local union Constitutions and/or By-Laws that were in effect prior to October 1, 1970, shall return to full force and effect, as amended or as they may be amended; and

(8) For the purposes of paragraph (7), hereinabove, any resolution providing for the payment of additional dues, duly adopted by any subordinate body of defendant union and duly ratified by the body's membership subsequent to October 1, 1970, and not repealed by the membership referendum of such subordinate body, shall continue in effect and shall be deemed an amendment to the Constitution and/or By-Laws of each restored local union whose membership, as of the date of the entry of this Judgment, constitutes a portion of such subordinate body; and

(9) In the event of appeal from this Order and Judgment, the commencement of the one year "status quo"period contemplated herein shall be stayed until the date of appellate determination or exhaustion of appellate procedures; and

(10) The Court shall retain jurisdiction of this cause and may make any modification of this Judgment

by counsel for the plaintiffs and by counsel for the defendants, it is found and determined that the defendants failed and refused to permit plaintiffs to have access to the defendants' membership lists for the purpose of distributing their views opposing the proposed Constitution; and further found and determined that the newspaper of plaintiffs' own local union, which contained arguments in opposition to the proposed Constitution, was not so widely distributed to defendants' members as to overcome the effect of defendants' failure to permit plaintiffs to have access to the defendants' membership lists, and for that reason the said referendum was not conducted in accordance with the requirements of the Labor-Management Reporting and Disclosure Act; and it is therefore

ORDERED, ADJUDGED AND DECREED that plaintiffs have judgment against defendants declaring that the referendum conducted in 1970 among defendants' membership concerning a proposed new Constitution was not in conformity with the requirements of the LMRDA, and that the Constitution proposed for adoption in such referendum was not lawfully adopted; and it is further

ORDERED, ADJUDGED AND DECREED that, in view of the fact, which I find, that the Constitution that was proposed for adoption in the said 1970 referendum has in fact been in force, though never lawfully adopted, from 1970 to this date, and that during such period of time many

and/or any further Order that may be appropriate either upon application of any plantiff or of defendant or of any member of defendant or upon its own motion, and grant whatever relief or further remedy may be appropriate.

Dated: New York, New York
August 5, 1975

/s/ Whitman Knapp
U.S.D.J.

Judgment Entered - 8/8/75

/s/ Raymond F. Burghardt
Clerk

Letter dated February 26, 1976 to Motley, J.

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

DY:lq

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

February 26, 1976

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

RE: Hodgson v. International Organization of Masters, Mates and Pilots
72 Civ. 5031 (CBM)

Dear Judge Motley:

Yesterday afternoon we received a copy of Mr. Marvin Schwartz's letter dated February 26, 1976 addressed to Your Honor, together with the enclosed "spreadsheet" and explanatory letter and the brief related to another matter before the Court of Appeals.

In his material Mr. Schwartz raises a number of issues that deserve comment.

First, Mr. Schwartz suggests that the second appeal in the case styled Sheldon v. O'Callaghan, 497 F.2d 1276 (2d Cir. 1974), cert. denied, 419 U.S. 1090*, which was argued before the Second Circuit today, has some bearing on the instant matter. His assertion is erroneous. The matter before the Second Circuit concerned the propriety by which the 1970 constitution of the International Organization of Masters, Mates and Pilots (IOMM&P) was approved by the union's membership. Certain members of

* This case is not to be confused with the case styled Sheldon v. O'Callaghan heard before Judge Croake in 1971 wherein Judge Croake found the IOMM&P's Newsletter was campaign material distributed in favor of O'Callaghan and his slate and that the IOMM&P did not make mailing lists available to candidates in former Local 88 (Port of New York) in further violation of the Labor Management Reporting and Disclosure Act. See Sheldon v. O'Callaghan, 335 F.Supp. 315 (S.D.N.Y. 1971); Exhibits CC and II, Government's Rule 9(g) Statement.

the union claimed that the 1970 constitution was adopted improperly in that dissident views on the adoption of that constitution were not properly disseminated by the union officers. The Second Circuit, on May 28, 1974 reversed the initial decision of Judge Knapp (which had dismissed plaintiff's complaint) and held that the 1970 constitution was improperly adopted; and the Court of Appeals remanded the matter to Judge Knapp merely to fashion relief. At that point, assuming the 1970 constitution was void, a scheduled trial date of June 17, 1974 for the case before Your Honor was adjourned. If the 1970 constitution was void, then the 1971 election held pursuant to that constitution likewise would be void. Accordingly, it was felt advisable to await the relief to be fashioned by Judge Knapp.

On June 13, 1974, however, the Court of Appeals modified their May 28, 1974 holding. Instead of merely reversing and remanding for relief purposes, the Second Circuit revised its opinion slightly and remanded for further evidence to be taken on the defendant union's assertion that they would have presented more evidence to the Court below had it's(union's) motion to dismiss not been granted. It then became apparent that the matter before Judge Knapp would not be expeditiously considered and accordingly the Government resumed preparation of the instant case.*

On July 2, 1975 Judge Knapp heard additional evidence in this matter and on August 5, 1975 he rendered judgment for the plaintiffs, finding that the plaintiffs had not been given proper opportunity to disseminate their views. The relief provided by Judge Knapp, however, does not void the 1970 union constitution under which the 1971 election was conducted. The 1970 constitution was not discarded and, indeed, may never be. We annex a copy of Judge Knapp's Judgment of August 5, 1976, wherein he set forth a lengthy procedure whereby the union must take action to allow the membership to reconsider and vote upon the 1970 constitution. It is clear that the union membership could

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* Enclosed herewith are copies of the Court of Appeals original slip opinion and its June 13, 1974 modification.

ratify the 1970 constitution and even if they don't, there is yet further opportunity to consider some newly devised constitution before the 1970 constitution is declared void altogether.

Judge Knapp himself, however, stayed his elaborate procedure "until the date of appellate determination or exhaustion of appellate procedures" . . . and now almost 7 months later the parties are still in that appellate stage.*

The case before Your Honor should now go forward; it is certainly not moot and should be delayed by the union no longer. If a new election is ordered under the Secretary's supervision, the Secretary of course would take into consideration any events that may be transpiring with respect to the union and would make every effort to coordinate the new election with the "normal" processes of the union as long as they are consistent with the orderly and expeditious rerun of the election as ordered by the Court and directed by the Secretary. In sum, the action heard by the Court of Appeals, respectfully, is irrelevant for the purposes of the present consideration of the instant case. There is no telling what ultimately will be the final result of that action or how long all of it will take. The impact of the tainted 1971 election, whatever it "may" be, should not be allowed to go unremedied any longer. A Court-ordered supervised election should now be imposed on the union, an election which the union has delayed for so very long. The action regarding the 1970 constitution, respectfully, should be disregarded.

Second, Mr. Schwartz mentions that the 1971 election of officers was only a transitional election and that all Offshore members now vote for all officers in the Offshore Division. That these facts may be so is of no consequence to the Secretary's suit contesting the 1971 election. The wrong was done at the time and a self-imposed revamping of their procedures without the Secretary's supervision does not satisfy requirements of 29 U.S.C. §482.

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* We understand that the Court of Appeals today affirmed Judge Knapp from the bench. Further appellate efforts of course could still be taken.

This matter is dealt with at length in our motion papers and the Court is respectfully referred thereto. See, Point IV, Government's Reply Memorandum, pp. 38-40.

Third, Mr. Schwartz itemizes the cost of running the 1974 election. This, too, is of no consequence to the instant action. The mere expenditure of money on a subsequent unsupervised intervening election does not wipe away the potential unknown impact that the 1971 violations "may" have had on the 1971 election and, as a result, on the future day-to-day life of the union. In sum, nothing with respect to the 1974 election should be considered ample to moot the Secretary's case regarding the 1971 election. See, Point VI, Government's Initial Memorandum and Point II, Government's Reply Memorandum.

Fourth, Mr. Schwartz suggests that "only a few" of the O'Callaghan slate members survived in the 1974 election. We have repeatedly pointed out that this fact, even if it were true, does not moot the 1971 election case. In any event, his assertion that only a few members survived is not true. In fact, approximately 50% of the O'Callaghan slate members did survive. This matter is dealt with at length in Point II of the Government's Reply Memorandum and we respectfully refer the Court thereto (see specifically, page 17 thereof and related Exhibits).

Fifth, Mr. Schwartz makes mention of the pending action brought by the Secretary seeking to overturn the 1974 election of officers (75 Civ. 2095 (CBM)) and he suggests that the issues in that case might be consolidated with the present action. In the 1971 action the Government alleged, inter alia, that it was improper for the three international officers to automatically assume the three top offices of the union's Offshore Division without their being a separate vote among the Offshore Division members for their own three top officers. In Point VI of our Reply Memorandum we have outlined this scheme more fully and have described the nature and significance of the duties and responsibilities of the three top officers of the Offshore Division. We opted not to move for summary judgment on this issue since all that had to be shown for the Secretary to be successful in the instant action was that the union committed one

violation which may have affected the outcome of the 1971 election. We further explained in Point VI of our Reply Memorandum that this additional issue could be and would be appropriately dealt with during the supervision stage by the Secretary and that, accordingly, there was no need for the Court to have to consider this issue at this time.

We continue to believe that the scheme employed by the union in this matter is tantamount to allowing the Governor of the State of New York elected by all the people in the State to become the Mayor of the City of New York without a separate election for the mayorality position. The City of New York, like the Offshore Division, is a separate entity and as legally constituted the Office of the Mayor has authorities and responsibilites separate from those of the Governor. The Mayor does not act as an agent of the Governor; he has certain independent authorities and accordingly is answerable to the people of the City of New York - thus he should be and is elected directly by the people of the City. The same should be true for the Offshore Division. It is no argument that the people in the City of New York participate in the selection of the Governor and therefor should have the Governor imposed on them as their Mayor.

We do not believe this action should be further delayed by the union's suggestion that this issue be decided now. This was one of the issues on which the union cross-moved for summary judgment but the consideration of which the Court at our request deferred. See letter of March 3, 1975 from Your Honor to the Government. If it is to be decided, more elaborate briefing may be required.* It is an issue that can be resolved during supervision, assuming a new scheme for Offshore Division officers proposed by the union is acceptable to the Secretary.** However the Court

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* If the Court wishes to decide this issue at this time, we would delightedly brief the matter more fully if it would be helpful to the Court.

** If a suitable substitute for the present illegal scheme is ultimately adopted and a new supervised election later certified by the Secretary to the Court, at that time the action with respect to the 1974 election would be discontinued.

wishes to treat this matter, it is clear that the present scheme for selecting the Offshore Division's top three officers is contrary to democratic principles, those principles upon which union elections are to be fashioned. In the event that the Court were to examine this scheme at this time, we believe it should be held to be unlawful.*

If the Court needs further elaboration on these issues or any other, we would be delighted to offer our assistance in any way.

Respectfully yours,

THOMAS J. CAHILL
United States Attorney

By: _____
DENNISON YOUNG JR.
Assistant United States Attorney
Telephone: (212) 791-1969

cc: Marvin Schwartz P.C.
243 Waverly Place
New York, New York 10014

Ernest Allen Cohen, Esq.
Jaffe Cohen & Crystal
275 Seventh Avenue
New York, New York 10001

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* See, Wirtz v. National Martime Union of America, 284 F. Supp. 47, 66-68 (S.D.N.Y.) affirmed 399 F.2d 544 (2d Cir. 1968). As with certain Patrolmen in the NMU case, which was tried before Your Honor, the Offshore Division's top three officers are "constitutional" officers with important duties who were de facto appointed by the IOMM&P Constitution and Offshore Division By-Laws. These three positions were "officer" positions (29 U.S.C. §402(n)) which were not filled by an "election".

Judgement of United States court of Appeals

For the Second Circuit

Judgement of United States District Court

For the Southern District

Opinion of United States Court of Appeals

For the Second Circuit

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of June, one thousand nine hundred and seventy-four

Present:

Hon. Henry J. Friendly, U.S.C.J.

Hon. William H. Timbers, U.S.C.J.

Hon. Roszel C. Thomsen, U.S.D.J.

~~Circuit Judges~~

Lloyd Sheldon et al. -against- Thomas F. O'Callaghan et al.	No. 73-1744

Upon consideration by the panel:

The opinion in the above entitled case, now in slip sheet form, is amended as follows:

At slip op. p. 3764-65, the last two paragraphs of the opinion are deleted, and the following is added:

We conclude that, on the evidence as it stood at the time defendants' motion to dismiss was granted, the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum.[9]

Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.

The judgment must be reversed, and the case remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

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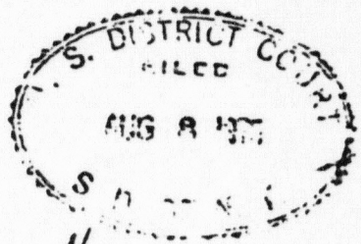
Henry J. Friendly

Wm H. Timbers

Roszel C. Thomsen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs,

-against-

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer or WILLIAM M. CALDWELL, as Vice President of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendants.

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70 Civ. 1279 WK

JUDGMENT

This case was tried on January 8 and 9, 1973, before the Court sitting without a jury. Following presentation of the plaintiff's case, on motion of defendants the case was dismissed. Upon appeal to the United States Court of Appeals for the Second Circuit, the dismissal was reversed and the cause remanded for further proceedings. Trial was resumed on July 2, 1975 and the case completed. Now, upon consideration of the evidence, and upon consideration of the arguments submitted orally and in writing by counsel for the plaintiffs and by counsel for the defendants, it is found and determined that the defendants failed and refused to permit plaintiffs to have access to the defendants' membership lists for the purpose of distributing their views opposing the proposed Constitution; and further found and determined that the newspaper of plaintiffs' own local union, which contained arguments in opposition to the proposed Constitution, was not so widely distributed to defendants' members as to

overcome the effect of defendants' failure to permit plaintiffs to have access to the defendants' membership lists, and for that reason the said referendum was not conducted in accordance with the requirements of the Labor-Management Reporting and Disclosure Act; and it is therefore

ORDERED, ADJUDGED AND DECREED that plaintiffs have judgment against defendants declaring that the referendum conducted in 1970 among defendants' membership concerning a proposed new Constitution was not in conformity with the requirements of the LMRDA, and that the Constitution proposed for adoption in such referendum was not lawfully adopted; and it is further

ORDERED, ADJUDGED AND DECREED that, in view of the fact, which I find, that the Constitution that was proposed for adoption in the said 1970 referendum has in fact been in force, though never lawfully adopted, from 1970 to this date, and that during such period of time many basic and fundamental changes in the structure of the union have taken place, and in the exercise of the equitable powers and jurisdiction of this Court, the following remedy be carried out:

(1) The Constitution that was proposed for adoption in the said 1970 referendum, as amended to date, hereinafter referred to as the "present Constitution", together with the existing Constitutions and/or By-Laws of the Union's subordinate bodies, shall, as so amended and as may in the future be amended, remain in force for a period of one year from the date of entry of this judgment; and

(2) The defendants shall promptly cause the said present Constitution to be sent out to defendants' membership for approval on a "yes" or "no" vote, upon a ballot in the form annexed hereto as Schedule "A"; and

(3) In the course of such referendum, the plaintiffs and other members opposed to adoption of the present Constitution shall be given a fair and reasonable opportunity to express their views concerning the same to their fellow members and to have their views published in the official newspaper of defendants, in conformity with the provisions of the present Constitution with respect thereto; and

(4) In the event that the membership approves the present Constitution, the same shall continue to remain in force and effect, as amended and as it may be amended together with the existing Constitutions and/or By-Laws of the Union's subordinate bodies, and this case shall be thereupon ended subject to application by plaintiffs and/or other members of defendant Union challenging the fairness of the referendum or of its procedures and to further order of this Court upon any such application; and

(5) In the event that the membership disapproves or fails to approve the present Constitution, then the defendants shall promptly convene a special Constitutional Convention which shall draft a new proposed Constitution, and the defendants shall submit the same to the membership for approval in a second referendum vote, also on a "yes" or "no" basis; and

(6) In the event that, in such second referendum vote, the membership shall approve the new proposed Constitution, then upon the expiration of one year from the entry of this judgment, or one month from the completion of such referendum, whichever first occurs, the new proposed Constitution shall come into force and effect and the existing Constitutions and/or By-Laws of all of the Union's subordinate bodies shall continue to remain

in full force and effect, but shall be deemed to be amended pro tanto, to conform to the provisions of such newly ratified Constitution; and

(7) In the event that the membership shall not, within one year from the entry of this Judgment, have approved in referendum vote as above set forth, either the present Constitution or the proposed new Constitution, or shall, having disapproved or failed to approve the present Constitution, disapprove the proposed new Constitution, then, either one month after disapproval of the proposed new Constitution or one year following entry of this Judgment, whichever may sooner occur, the Constitution and the local union Constitutions and/or By-Laws that were in effect prior to October 1, 1970, shall return to full force and effect, as amended or as they may be amended; and

(8) For the purposes of paragraph (7), hereinabove, any resolution providing for the payment of additional dues, duly adopted by any subordinate body of defendant union and duly ratified by that body's membership subsequent to October 1, 1970, and not repealed by the membership referendum of such subordinate body, shall continue in effect and shall be deemed an amendment to the Constitution and/or By-Laws of each restored local union whose membership, as of the date of the entry of this Judgment, constitutes a portion of such subordinate body; and

(9) In the event of appeal from this Order and Judgment, the commencement of the one year "status quo" period contemplated herein shall be stayed until the date of appellate determination or exhaustion of appellate procedures; and

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(10) The Court shall retain jurisdiction of this cause and may make any modification of this Judgment and/or any further Order that may be appropriate either upon application of any plaintiff or of defendant or of any member of defendant or upon its own motion, and grant whatever relief or further remedy may be appropriate.

DATED: New York, New York
August 4, 1975

U.S.D.J.

JUDGMENT ENTERED — 8/8/75
Raymond F. Burghardt
CLERK

SCHEDULE "A"

The 1970 International Constitution, with its amendments to date, enclosed with this ballot, is being submitted to the membership for ratification by a secret referendum ballot, pursuant to the direction of Judge Whitman Knapp, United States District Court for the Southern District of New York.

The Court has directed the membership to vote "yes" or "no" on whether you favor the present Constitution.

Are you in favor of the enclosed present Constitution?

Yes ☐ No ☐

In the event the membership rejects the present Constitution the Court has ordered that a special Convention will have to be convened to draft a new Constitution which will again have to be submitted to the membership for approval by a secret referendum ballot.

VOTING INSTRUCTIONS

[To be prepared by Ballot Committee]

~~(Form of ballot as proposed by defendants)~~

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 841—September Term, 1973.

Docket No. 73-1744

(Argued April 11, 1974 Decided May 28, 1974.)

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs-Appellants,

v.

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President, of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendant-Appellee.

Before:

FRIENDLY and TIMBERS, *Circuit Judges,*
and THOMSEN, *District Judge.**

Plaintiffs-Appellants, members of the International Organization of Masters, Mates and Pilots, AFL-CIO, brought this action in the Southern District of New York against the three International officers of the union for an

* Of the District of Maryland, sitting by designation.

injunction preventing a new union constitution from becoming effective. They appeal from an adverse judgment entered by Judge Knapp at the close of plaintiffs' case. Reversed and Remanded.

BURTON H. HALL, New York, New York, *for plaintiffs-appellants.*

MARVIN SCHWARTZ, New York, New York, *for defendant-appellee.*

THOMSEN, *District Judge:*

Plaintiffs, members of the International Organization of Masters, Mates and Pilots, AFL-CIO (the union), brought this action in the district court against the three International officers of the union for an injunction preventing a new union constitution from becoming effective. They appeal from an adverse judgment entered at the close of plaintiffs' case.

Plaintiffs argued below and argue here that defendants, as officers of the union, infringed the rights of plaintiffs and other members of the union under § 101 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411, and under the old constitution of the union, (1) by not permitting separate votes on the various provisions of the new constitution, which included an increase in dues and an enlargement of the powers of the defendant officers, but requiring a single "yes" or "no" vote on the adoption of the new constitution; and (2) by publishing allegedly misleading information about the new constitution and refusing to permit plaintiffs either (a) to state their objections to the new constitution in the union newspaper, or (b) to have access to the union's mailing list or to have the list made available to a mailing service se-

lected by defendants, so that plaintiffs could transmit their views to the other members of the union before or during the voting period.

The stipulated facts and other evidence show that before 1968 the union consisted of largely autonomous local unions, although its collective bargaining agreements were negotiated on an industry-wide basis. In response to suggestions to eliminate the local unions and consolidate their powers and responsibilities into divisions which corresponded to the bargaining patterns in the industry (i.e., offshore, inland, governmental employees and pilots), plaintiff Sheldon, who was then International President, appointed a Constitutional Advisory Committee.[1] That committee prepared proposals for restructuring the union, including a proposal to consolidate the local unions into divisions. Those proposals were published in the March 1968 issue of the union newspaper, which is mailed to each member's home address, to the ships on which members are employed, to each local union, and to recreation centers overseas.

The committee's proposals were put before the International convention held in May 1968. The convention decided to hold an advisory referendum of the entire membership on the issue of restructuring the union through consolidation of locals into divisions. The advisory referendum approved the principle of restructuring and consolidation by a vote of about five to two.

In December 1968 the International Executive Board voted to convene a special constitutional convention to be held in September 1969. The result of the advisory referendum and the decision to convene a constitutional convention were reported in the January 1969 issue of the union

1 Sheldon was thereafter defeated in his bid for reelection by the current President, defendant Thomas F. O'Callaghan.

newspaper. The constitutional convention met in September 1969. It proposed certain constitutional amendments and a description of a proposed structure for an Offshore Division and other divisions. These proposals were published in the October 1969 issue of the union newspaper.

The convention on January 26, 1970, to consider a draft of a proposed new constitution, which contained a variety of amendments to the then-existing constitution. It "consolidated" all local unions of the sea-going members, who comprise some 8,000 of the union's total membership of 10,000, into a nation-wide Offshore Division, and created other nation-wide divisions for non-seagoing members. It changed the union's dues structure in various ways and increased the rates of dues payable by more than half of the union's members. It raised the salaries of the two top International officers, and provided for a new, $35,000 salary for a third, previously unsalaried International officer. It greatly increased the power of the three International officers by providing that those three officers were to become the three top officers of each division, including the Offshore Division, and by virtue of being the three top officers of the Offshore Division would be able to cast one-half of the weighted vote of the Offshore Division on the General Executive Board of the union.

The pre-existing constitution provided that it might be amended by a two-step procedure: approval at a convention and, thereafter, approval by the membership in a referendum.

At the session of the constitutional convention on January 31, 1970, a delegate raised a point of information as to whether the separate provisions of the "new" constitution would be voted upon seriatim or separately; the Chairman (defendant O'Callaghan, the International President) ruled that the entire document would be voted upon as a single package. The proposed constitution was put to a

vote at the convention and was approved by a more than two-thirds vote.

During the convention, the International President announced that a committee composed of the executive officers (or their designees) of each offshore local would meet after the close of the convention for the preparation of Offshore Division by-laws. After the convention had dissolved, that committee met and drafted a set of by-laws for the Offshore Division.

During February 1970 a copy of the proposed constitution was sent to the executive officer of each local union and a mimeographed copy of the proposed Offshore Division by-laws was sent to the executive officer of each offshore local. The referendum was to be conducted by mail, over a three month period beginning in March 1970 and ending in June 1970. All members were to vote on the adoption of the proposed constitution; all offshore members were to vote on the adoption of the proposed Offshore Division by-laws.

One of the provisions of the proposed constitution was widely publicized by defendants before and during the referendum; that was the provision which would consolidate all sea-going local unions into one division—a popular proposal.

On February 23, 1970, the three International officers sent a letter to each member of the union summarizing what they described as the "high points" of the proposed constitution and urging its adoption.[2] The March 9, 1970

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2 The letter referred not only to the consolidation of local unions, but to at least seventeen other provisions in the new constitution. These included such matters as "Closing of membership rolls until a reasonable membership/job relationship exists", liberalization of qualification for elective office, annual conventions, reduction in terms of elective office, disciplinary procedural changes, recall of officers, and obtaining a national pension and welfare plan. On the question of a dues increase, the letter stated: "The dues for the Offshore Division calls for an in-

issue of the union newspaper published the text of the proposed new constitution in full, and reprinted the February 23 letter of the International officers.

Shortly after receiving the February 23 letter plaintiffs, individually and as members of a committee elected by Local 88 to oppose the new constitution, asked for an opportunity to express their views to the membership of the union, either by space in the union newspaper, by use of the union's mailing list, or through an independent mailing service designated by the International office, at the cost of the plaintiffs. Their requests were ignored or denied. On the other hand, defendants repeatedly published material favoring the new constitution. In addition to reprinting the February 23 letter on the back page of the March 1970 issue of the union newspaper, the International officers published, in the two issues of the paper which appeared during the referendum period, a substantial amount of material advocating approval.

A ballot containing spaces for a "yes" or "no" vote on the proposed new constitution was sent to each member of the union, together with a booklet containing the text of the proposed constitution. Each offshore member also received a second booklet, containing the text of the proposed Offshore Division by-laws, on which their ballots called for "yes" or "no" votes.

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crease. Inland dues remain the same. For the past several years the initiation fees have paid over thirty-five percent of the International expenses. Income from initiations will cease until the membership/job ratio is realized. The necessity of a dues increase is obvious."

Neither the letter of February 23 nor any other letter to the membership nor any issue of the union newspaper contained any discussion of the proposal to make the three International officers automatically the three top officers of all divisions, or of the proposal to give the three International officers half the weighted vote on the General Executive Board of the Offshore Division. Nor did the union, or any of its officers, publish any statement or article by any opponent of the proposed constitution.

The ballots were counted in June 1970. The new constitution was approved by a vote of 2,781 for and 2,602 against; the Offshore Division by-laws were approved by a vote of 2,206 for and 2,113 against. The new constitution and Offshore Division by-laws went into effect after plaintiffs filed this action.

(1) Plaintiffs' first argument is that the defendants infringed their rights and the rights of other members of the union under § 101 (a) (1) and (3) of the LMRDA, 29 U.S.C. 411 (a) (1) and (3),[3] and under the old constitution, by not permitting separate votes on the various provisions of the new constitution; particularly, they object to not having been able to vote on the dues increase and the enlarged powers of the International officers separately from the consolidation of the local unions, which plaintiffs and most union members favored.

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3 § 101 (a) (1) provides: "*Equal rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

§ 101 (a) (3) provides that dues shall not be increased except:

"• • •

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

Plaintiffs rely on *Sertic* v. *Cuyahoga, Lake, Geauga & Ashtabula Cos., C.D.C.*, 423 F.2d 515 (6 Cir. 1970), where the court held that a referendum that resulted in an increase in dues, in which the ballot gave a member no opportunity to vote against such increase without also voting against negotiations for a wage increase, was a violation of the LMRDA. The Sixth Circuit stated that free participation in union government "necessarily would include the right to vote 'yes' or 'no' on increases of dues or assessments without coercion. • • • Union members are entitled under the Act to the right of a meaningful vote on increases in dues or assessments". (p. 521). We do not disagree with the principles stated in *Sertic*, but we conclude that those principles did not require the union in the instant case to submit for a separate vote each of the many interrelated provisions of the proposed new constitution. The adoption of some of those provisions and the rejection of others might have resulted in an unworkable document, and thrown the operation of the union into confusion.[4]

Nor is there any merit in plaintiffs' contention that the old constitution required a separate vote on the various provisions of the proposed new constitution which differed from the provisions of the old.

(2) Plaintiffs also argue that defendants deprived them of their rights under § 101 (a) (1) of LMRDA, 29 U.S.C. 411 (a) (1), and under the old constitution of the union, by publishing misleading information about the new constitution and refusing plaintiffs' repeated requests for permission either to state their objections to the new constitution

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4 The district court found: "The Union, and particularly the Convention delegates responsible for drafting the new Constitution to be submitted to the membership, could reasonably have concluded that the dues increase for offshore members was related to the restructuring and consolidation of the Union provided for in the new Constitution, including the limitation on new members."

in the union newspaper, or to have access to the union's mailing list, or to have the list made available to a mailing service selected by defendants, so that plaintiffs could transmit their views to the other members of the union before or during the voting period.

The purpose of the LMRDA was stated by Chief Judge Lumbard in *Navarro* v. *Gannon*, 385 F.2d 512, 518 (2 Cir. 1967), as follows:

> "The LMRDA was enacted with the clear purpose of assuring 'the full and active participation by the rank and file in the affairs of the union.' American Federation of Musicians v. Wittstein, 379 U.S. 171, 182-183, 85 S.Ct. 300, 307, 13 L.Ed.2d 214 (1964). The Congress by passing a 'Bill of Rights' for union members determined that the efficiency of a monolithic union under autocratic rule was gained at too great a price if it necessitated any sacrifice in the members' rights to determine the course of their organization. The balance was struck in favor of union democracy. Only a union responsive to the rights of all its members can achieve the ideals of responsibility, opportunity and self-determination that are recognized as fundamental values in the labor movement."

In *Schuchardt* v. *Millwrights & Mach. Erectors Loc. U. No. 2834*, 380 F.2d 795, 797 (10 Cir. 1967), the court said: "The basic purpose of the 'bill of rights' • • • is to assure to union members a basically democratic union organization with concomitant protections against arbitrary and despotic control by union leaders." As Professor Cox put it: "An individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss. Only a democratic union, sensitive to the rights of minorities, can help men to achieve the ideals of indi-

vidual responsibility, equality of opportunity, and self-determination.[5]

On the other hand, the provisions of the LMRDA were not intended to constitute an open invitation to the courts to intervene in the internal affairs of a union. See *Gurton v. Arons*, 339 F.2d 371, 375 (2 Cir. 1964).

Former Representative, now Senator Griffin recently wrote: "Congress sought to strike a balance between rights for individual members and the recognized institutional requirements necessary for a union to be an effective bargaining force."[6]

This court recognizes the need to exercise what Judge Wisdom referred to as a "sound reluctance • • • to interfere in internal union affairs" *Allen v. International Alliance of Theatrical, etc.*, 338 F.2d 309, 317 (5 Cir. 1964). However, the court also recognizes its duty to protect the fundamental rights of individual members against "arbitrary and despotic control by union leaders". *Schuchardt v. Millwrights & Mach. Erectors Loc. U. No. 2834*, supra.

Plaintiffs complain because defendant officers emphasized popular features of the proposed constitution while ignoring or playing down other features which would have been unpopular with many of the members.[7] The duly elected officers of a union have a right and a responsibility to lead, and to give the members the benefit of their advice on questions that arise. They have a right to use the union

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5 Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 610 (1959).

6 Griffin, The Landrum-Griffin Act: Twelve Years of Experience in Protecting Employee Rights, 5 Ga. Law Rev. 622 (1971).

7 Plaintiffs also sent copies of the proposed constitution to all members and copies of the proposed Offshore Division by-laws to all offshore members. The union was composed of persons who were sufficiently well educated to serve as masters, mates and pilots, and who presumably could read and understand those documents.

publications to express their views, and are not ordinarily required to give space therein to the expression of contrary views, provided they do not interfere improperly with whatever rights members may have to communicate their views to other members.

The new constitution contains a provision that:

"h) Every member shall have the right to:

"1) Circulate petitions on union policy.

"2) Publish and distribute leaflets, newspapers and all other written material or present his opinions through other media.

• • •"

The old constitution contained no similar provision, but that does not end the matter.

The old constitution provided for a referendum in which all members in good standing were eligible to vote. The International officers had a duty under the LMRDA to conduct a fair referendum, and that obligation should be enforced by the courts. No special expertise in union affairs is required: for more than a hundred years courts have been dealing with similar rights of members of unincorporated associations. See Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930): Developments in the Law: Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 985 (1963).

The majority rule concept is at the center of our federal labor policy. Because of that policy the Supreme Court has found it necessary to fashion the duty of fair representation. For the same reason Congress enacted a code of fairness to assure democratic conduct of union affairs. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

A fair referendum under the facts of this case included the right of members whose views were opposed to defen-

dants' to have an opportunity to present their views to other members of the union. This was particularly true in the case of plaintiffs, who were members of a committee appointed by a large local to present the views of that local to other members of the union.

We do not hold that defendants were required to give plaintiffs space in the union newspaper to present their views. Whether plaintiffs were entitled to a list of the membership is a more troublesome question, since there are reasons why a union may not wish to take the risk of its membership list falling into the wrong hands.[8] It is not necessary to decide that question in this case, because plaintiffs made an alternative proposition, namely, to pay the expenses of having their views sent to the other members of the union through a mailing service selected by defendants.

We conclude that the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum.[9]

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8 The California courts have held that apart from the LMRDA, the members of a union have a right to inspect the union's books and records for a proper purpose, and one California court has indicated that this rule applies to lists of members. See *Mooney* v. *Bartenders Union Local No. 284*, 48 Cal. 2d 841, 313 P.2d 857, 64 A.L.R.2d 1154 (1957); *Hod Carriers Local 89* v. *Young*, 42 L.C. 61,641 (Cal. Super. Ct., San Diego, 1961). Labor's Bill of Rights was not intended to narrow the rights of union members.

9 Neither *Calhoon* v. *Harvey*, 397 U.S. 134 (1964), nor *Robins* v. *Barback*, 325 F.2d 925 (2 Cir. 1963), cert. denied, 379 U.S. 974 (1965), is directly applicable to this case, since they involved union elections rather than referendums. Title IV of the LMRDA provides detailed procedural safeguards for union elections, and the *Calhoon* Court held that the exclusive remedy for protecting those election rights was through a post-election suit by the Secretary of Labor. Of course, those cases and *Gurton* v. *Arons*, 339 F.2d 371 (2 Cir. 1964), a referen-

The judgment must be reversed. What relief is appropriate, however, cannot be decided by this court on the present record. The case will, therefore, be remanded to the district court to fashion such relief as may be most fair and equitable under all the circumstances.

Reversed and Remanded.

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dum case, strongly suggest that courts should be reluctant to interfere with internal union affairs absent specific statutory license. In this case, however, the defendant union officials' stiff-necked refusal even to provide their opponents access to the membership mailing list rendered the referendum procedure so patently unfair that their conduct can fairly be deemed "a denial of the [members'] equal right to vote in elections or referendums," *Gurton v. Arons*, supra, 309 F.2d at 374.

Letter dated February 26, 1976 to Judge Motley

3979a

LAW OFFICES
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February 26, 1976

HAND DELIVERED

Hon. Constance Baker Motley
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Attention: Mr. J. Farmer

Re: Hodgson v. IOMM&P
72 Civ. 5031 (CBM)

Dear Judge Motley:

I am enclosing a "spread sheet" with an explanatory letter attached which I believe will be helpful in understanding all that has happened since the 1971 election which is the subject of this litigation.

I am also enclosing a copy of Appellant's Brief in the Sheldon v. O'Callaghan matter which will be argued before the Court of Appeals tomorrow, Thursday, February 26. As Your Honor may recall, this is the case in which the 1970 consolidation was challenged. At one point, the trial of this case was postponed pending clarification of the Second Circuit Court's decision of

May 28, 1974 (see copy of Department of Labor's letter dated June 20, 1974 attached.)*

I do hope that we will be given a new date for oral argument which I sincerely believe will be quite helpful to the Court. Aside from the usual ones, the events depicted in the "spread sheet" and also the possible impact of the Sheldon v. O' Callaghan litigation are additional reasons.

Please accept my sincere thanks for granting my request for the adjournment last week.

Respectfully,

Marvin Schwartz

MARVIN SCHWARTZ

MS:eml
Encs.

CC: Dennison Young, Jr., Esq.
Ernest Allen Cohen, Esq.

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*In Sheldon v. O'Callaghan, the plaintiffs brought a Motion for Summary Judgment which was denied. At the end of the plaintiffs' case before Judge Knapp, their suit was dismissed. The Court of Appeals reversed Judge Knapp, holding for the plaintiffs. An application for rehearing was filed which was denied by the Court of Appeals. However, shortly thereafter the Court of Appeals amended its decision to permit the defendants to show that the plaintiffs had in fact disseminated their views to the membership. The trial came on before Judge Knapp who, at the end of the defendant's case, found for the defendants. About three weeks later, he changed his mind and found for the plaintiffs. It is this last decision which will be before the Court of Appeals tomorrow.

3081a

U. S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
26 FEDERAL PLAZA

NEW YORK, NEW YORK 10007

June 20, 1974

Mr. Robert F. Wagner
Box 2867
Texas City, Texas 77590

Dear Mr. Wagner:

In reply to your letter of June 4, 1974 concerning the schedule for election of officers of Masters, Mates & Pilots, please be advised that the trial concerning the 1971 election schedule to convene on June 17, 1974 has been postponed pending clarification of a decision rendered on May 28, 1974 by the Second Circuit Court of Appeals regarding the adoption of the constitution in 1970.

Therefore, at this time we cannot advise you of the supervision that the Labor Department may render in the next election of officers.

Very truly yours,

HENRY W. BERRY
Assistant Area Director

BOH/mal

WAS ENTITLED TO VOTE NOT ONLY FOR OFFICIALS IN THAT PORT BUT ALSO FOR THE OFFICIALS IN ALL OTHER PORTS.

THE 1974 ELECTION THE FIRST NATIONAL ELECTION, WAS CONDUCTED UNDER THE AUSPICES OF THE AMERICAN ARBITRATION ASSOCIATION AT RECORD FINANCIAL COST. THE BILLS PAID BY THE UNION WERE AS FOLLOWS:

PRINTING	$ 26,477.56
COMMITTEE EXPENSES	85,897.33
AMERICAN ARBITRATION ASSOCIATION FOR ELECTION AND RUN-OFF ELECTION	130,111.34
VERBATIM TRANSCRIPT	10,360.05
JOHN HAROLD, ESQ. ATTORNEY FOR THE BALLOT COMMITTEE	10,000.00
TOTAL COST FOR INTERNATIONAL ELECTIONS AND RUN-OFF ELECTION	$262,846.28

IN THE 1974 ELECTION, THE DECISION WAS MADE BY THE BALLOT COMMITTEE TO HEAR AND DECIDE ALL CHALLENGES OF ALL TYPES BEFORE ANY OF THE BALLOTS WERE OPENED. THE DECISION WAS ALSO MADE TO ACCEPT AN IMPARTIAL ARBITRATOR, DESIGNATED BY THE AMERICAN ARBITRATION ASSOCIATION, TO HEAR APPEALS FROM ANY RULINGS BY THE BALLOT COMMITTEE BEFORE THE BALLOTS WERE OPENED. ALSO A VERBATIM TRANSCRIPT OF ALL OF THE PROCEEDINGS WAS RECORDED.

THE 1974 ELECTION WAS CHALLENGED BY ONE MEMBER OF THE UNION AND THE DEPARTMENT OF LABOR HAS FILED SUIT CHALLENGING THE 1974 ELECTION. HOWEVER, THE ONLY ISSUE IN THAT LAWSUIT IS WHETHER

OR NOT THE UNION'S CONSTITUTIONAL PROVISION WHICH PROVIDES THAT THE INTERNATIONAL OFFICERS ARE EXECUTIVE AND FINANCIAL OFFICERS OF THE NEW FULLY FORMED OFFSHORE DIVISION VIOLATES THE STATUTE. UNDER THAT NEW CONSTITUTIONAL PROVISION, THE INTERNATIONAL OFFICERS SIT AS MEMBERS OF THE SEVENTEEN (17) MEMBER OFFSHORE DIVISION EXECUTIVE COUNCIL. EACH MEMBER OF THE OFFSHORE DIVISION EXECUTIVE COUNCIL, INCLUDING THE INTERNATIONAL OFFICERS HAVE ONE VOTE.

IN AN EFFORT TO DISPOSE OF ALL MATTERS, THE DEFENDANT HAS NO OBJECTION TO JOINING THAT SOLE 1974 ELECTION ISSUE AS PART OF THE SUMMARY JUDGMENT PROCEEDINGS BEFORE THE COURT. HOPEFULLY, A PROCEDURE FOR ACCOMPLISHING THIS CAN BE DONE AT THE ORAL ARGUMENT.

FINALLY, THE "SPREAD SHEET" ATTACHED EXPLAINS WHAT HAS HAPPENED TO THE VARIOUS CANDIDATES SINCE THE 1971 ELECTION. THE PARTICULAR CANDIDATE INVOLVED IN THIS LAWSUIT, CAPTAIN LLOYD SHELDON, IS RETIRED AND LIVING IN COSTA RICA. HE IS NO LONGER A MEMBER OF THE UNION HAVING ADVISED THAT HE IS ON A "DUES STRIKE."

IT SHOULD BE NOTED IN THE "SPREAD SHEET" BELOW THERE ARE A NUMBER OF POSITIONS ABOLISHED. IN THE DECLINING MARITIME INDUSTRY WITH THE RESULTING DECLINING MEMBERSHIP, ALL MARTIME UNIONS HAVE CUT BACK. THE POSITIONS ABOLISHED IN EACH INSTANCE WAS ACCOMPLISHED UNDER THE APPROPRIATE PROVISIONS OF THE OFFSHORE DIVISION BY-LAWS AND HAVE NEVER BEEN CHALLENGED.

THE * IN THE "SPREAD SHEET" ATTACHED DESIGNATE O'CALLAGHAN SLATE CANDIDATES IN BOTH THE 1971 AND 1974 ELECTIONS. AS THE "SPREAD SHEET" SHOWS, ONLY A FEW SURVIVED THE 1974 ELECTION.

BALTIMORE ASST. PORT AGENT	SILVER* CONRAD	SILVER	NO	MOHR; CONRAD SCHULTZ; SNOW* RAY	SNOW MOHR
PHILADELPHIA PORT AGENT	HANDLEY*	HANDLEY	NO(RETIRED)	JESS*; ELIAS; VECCHIONE	JESS
NORFOLK PORT AGENT	BEACH*	BEACH	YES	BEACH* SIMMONS	SIMMONS
CHARLESTON FIELD REP.	McCLEAN	McCLEAN	YES (BOSTON)	POSITION ABOLISHED	
NORFOLK ASSISTANT PORT AGENT	-----	-------	-------	PECIL*	PECIL
BOSTON PORT AGENT	KING* CONNOLLY	KING	NO (RETIRED)	McCLEAN ROSAND*	McCLEAN
BOSTON ASSISTANT PORT AGENT	FLAHERTY*	FLAHERTY		POSITION ABOLISHED	
PROVIDENCE ASSISTANT PORT AGENT	------	--------	---------	BRADY* YAKAVONIS	BRADY
GALVESTON EXEC. ASST. PORT AGENT	CONNALLY*	CONNALLY		POSITION ABOLISHED	

OFFICE	MAJOR CANDIDATES 1971	WINNER(S) 1971	INCUMBENT SEEKING RE-ELECTION 1974	MAJOR CANDIDATES 1974	WINNER(S) 1974
INT'L PRES.	O'CALLAGHAN * SHELDON	O'CALLAGHAN	YES	SCAVO O'CALLAGHAN *	SCAVO
INT'L V.P.	CALDWELL* VANCE KOONCE	CALDWELL	YES	CALDWELL * JOHNSON	JOHNSON
INT'L SEC-TREAS.	LOWEN* NORSTRAND	LOWEN	YES	LOWEN * BROWN	LOWEN
N.Y. PORT AGENT (V.P. ATLANTIC)	GAIER* HEMMING	GAIER	YES	GAIER * HEMMING	HEMMING
GALVESTON PORT AGENT (V.P. GULF)	JONES* GORDON	JONES	YES	JONES * HOLDEMAN	HOLDEMAN
SAN FRANCISCO PORT AGENT (V.P. PACIFIC)	LARSON* OFELT	LARSON	YES	LARSON * OFELT VALENTINE	LARSON
BALTIMORE PORT AGENT	WEINSTEIN*	WEINSTEIN	YES	HOPKINS WEINSTEIN *	HOPKINS
BALTIMORE EXEC. ASST. PORT AGENT	SNOW *	SNOW	YES	POSITION ABOLISHED	

GALVESTON ASST. PORT AGENT	---------	---------	----------	WAGNER HERMANN* HALL	WAGNER
HOUSTON PORT AGENT	PALUMBO* WILKINS	PALUMBO	YES	PALUMBO* WILKINS	WILKINS
HOUSTON ASST. PORT AGENT	NEUMANN* CHAMBERLIN	NEUMANN	YES	NEUMANN* GUNTER SMITH	NEUMANN
PORT ARTHUR PORT AGENT	GIBLIN* DOHERTY MCNEAL	GIBLIN	YES	GIBLIN* CUMMINGS GAINES	CUMMINGS
JACKSONVILLE PORT AGENT	SCOTT* MACALVANAH	SCOTT	YES	SCOTT* NORSTRAND WELLS	SCOTT
SOUTHEAST FLORIDA FIELD REPRESENTATIVE	MURPHY* BROWN	MURPHY		POSITION ABOLISHED	
MOBILE PORT AGENT	KYSER*	KYSER	YES	KYSER* ANDERSON	ANDERSON
TAMPA FIELD REPRESENTATIVE	STANELY* PURDY	STANLEY		POSITION ABOLISHED	
NEW ORLEANS PORT AGENT	STEGALL* LAROCCA	STEGALL	NO RETIRED)	LAROCCA: COYLE CASSELBERRY*	CASSELBERRY
NEW ORLEANS EXEC. ASST. PORT AGENT	COYLE CASSELBERRY	CASSELBERRY	YES	POSITION ABOLISHED	

NEW ORLEANS ASST. PORT AGENT	REID	REID	YES	PARHAM * PSCENICKA REID * SMITH MORALES *	PSCENICKA MORALES SMITH
NEW YORK EXEC. ASST. PORT AGENT	SCAVO CLIFFORD	SCAVO	YES (INT'L PRES.)	NEREAUX POLACHEK *	NEREAUX
NEW YORK ASST. PORT AGENT #1	HENDRY * FOWLER * WHITE * NEREAUX SOTO SEYBERT CORNEILLE *	HENDRY FOWLER WHITE CORNEILLE	NO	? BURLINGAME GRAS STANLEY * SWANSON KOONCE ? THOMPSON	SWANSON THOMPSON KOONCE GRAS
PROVIDENCE PORT AGENT	BEIRNE * BASSETT	BEIRNE	NO (RETIRED)	POSITION ABOLISHED	
SAN FRANCISCO EXEC. ASST. PORT AGENT	TUTTLE * VALENTINE	TUTTLE	YES	TUTTLE * WHITE	WHITE
SAN FRANCISCO ASST. PORT AGENT #1	MARTIN * PERRY	MARTIN	YES (ASST. P.A.)	POSITION ABOLISHED	
SAN FRANCISCO ASSISTANT PORT AGENT	YORK ARMBRUST	YORK	YES	MARTIN * KAY YORK * BARA CALDWELL *	MARTIN YORK BARA
SAN FRANCISCO DISPATCHER	JACKSON * KAY	JACKSON		POSITION ABOLISHED	

SEATTLE PORT AGENT	SORIANO* DENTE	SORIANO	YES	SORIANO* DENTE	SORIANO
PORTLAND PORT AGENT	WALLACE* PERRY	WALLACE	YES	WALLACE * HAVERFIELD	HAVERFIELD
WILMINGTON, CALIF. PORT AGENT	WALTHER* BARA BURKE	WALTHER	YES	WALTHER * VALENTINE BURKE	BURKE
WILMINGTON, CALIF. ASST. P.A.	BARBARA MOREL LINDSAY HARING*	BARBARA	YES	BARBARA*	BARBARA
SAVANNAH FIELD REP.	HOWARD WILLIAMS* ALMON WILLIAMS	HOWARD WILLIAMS		POSITION ABOLISHED	

*CANDIDATES IDENTIFIED WITH SO-CALLED O'CALLAGHAN SLATE IN BOTH THE 1971 AND 1974 ELECTIONS.

30872

75-7504

United States Court of Appeals

For the Second Circuit

Docket No. 75-7504

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs-Appellees,

against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President, of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendant-Appellant.

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN AND JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Plaintiffs-Appellees,

-against-

Docket No. 75-7504

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice President, of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendant-Appellant.

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from an unreported judgment in favor of the plaintiffs by the Honorable Whitman Knapp, upon remand from the United States Court of Appeals for the Second Circuit. The prior decision of this Court, reversing Judge Knapp's earlier decision, and remanding the case to him for further proceedings, is officially reported as Sheldon v. O'Callaghan

497 F. 2d 1276 (2d Cir. 1974), cert. denied, 419 U.S. 1090 (1974)

ISSUES PRESENTED

This is an action seeking to set aside a union Constitution approved by membership referendum in a ninety day period between March and June 1970. The trial of the case was held on January 8th and 9th, 1973, before the Honorable Whitman Knapp, U.S.D.J., sitting without a jury. Following presentation of the plaintiffs' case, and on motion of the defendant, Judge Knapp dismissed the action.

On appeal to this Honorable Court, the Judgment was reversed, and the case was remanded to Judge Knapp for further proceedings, with the following mandate from this Court:

> "We conclude that, on the evidence as it stood at the time defendants' motion to dismiss was granted, the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum. [Footnote omitted]
>
> Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.

> The judgment must be reversed, and the case remanded for further proceedings consistent with this opinion."
> 497 F.2d at p. 1282, 1283

The trial continued on July 2, 1975, with the presentation of the defendant's case. At the conclusion of the case, Judge Knapp, from the bench, ruled that the specifications in the Court of Appeals' mandate had been met by the defendant, and he dismissed the plaintiffs' action. (J.A. 116a, 117a)* On July 28, 1975, Judge Knapp reversed his ruling, and awarded judgment in favor of the plaintiffs. (J.A. 118a, 119a)

The issues presented by this appeal are:

1. In the Union referendum on the adoption of the new Constitution, were the views of the opponents to the new Constitution disseminated sufficiently so as to satisfy the requirements of the Labor Management Reporting and Disclosure Act, as described by the mandate of the Court of Appeals?

2. Even in the event such requirements were not met, did not the passage of some five years during which the Union has conducted its affairs under the new Constitution, and in which time a complete restructuring of the Union has taken place, and during which time three separate, unchallenged

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* "J.A." refers to the Joint Appendix; "Tr." refers to the typewritten trial transcript; "Exh." refers to Exhibits introduced into evidence at trial.

membership referenda amending the 1970 Constitution have taken place, constitute a proper ratification of the 1970 Constitution nunc pro tunc?

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS

This is a suit brought by five members of the International Organization of Masters, Mates and Pilots seeking to set aside the Union's new Constitution which was approved by a membership referendum held in a ninety day period between March and June 1970.

The plaintiffs alleged a number of irregularities attendant upon the referendum proceedings. A primary complaint was that it was improper for the entire new Constitution to be sent out to the membership on a "yes" or "no" basis, rather than submitting to the membership, for some sort of seriatim vote, a series of amendments by which the old Constitution was to be changed. Among the other complaints was one challenging the fairness of the balloting and vote-counting procedures.

The trial of the action took place on January 8 and 9, 1973, before the Honorable Whitman Knapp, United States District Judge, sitting without a jury. Following the presentation of the plaintiffs' case, and on motion of the defendant, Judge Knapp dismissed the action.

The plaintiffs appealed from Judge Knapp's ruling on a number of grounds. The Court of Appeals reversed the decision of the District Judge, but on only one single ground. This involved the question of the ability of the opponents to the new Constitution to disseminate their views to the membership.

The Court of Appeals remanded the case back to the District Judge on this sole issue, with the following mandate:

> "We conclude that, on the evidence as it stood at the time defendants' motion to dismiss was granted, the LMRDA, interpreted in the light of established legal principles, required defendants to make the list of members of the union available to a mailing service chosen by defendants so that plaintiffs could send a letter to all members expressing their views and the view of their local on the issues involved in the referendum. [Footnote omitted]
>
> Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.
>
> The judgment must be reversed, and the case remanded for further proceedings consistent with this opinion."
> 497 F.2d at p. 1282, 1283

The defendant filed a Petition for a Writ of Certiorari on the Court of Appeals' reversal of Judge Knapp's dismissal of the case. The plaintiffs filed a Cross-Petition, claiming that

the Court of Appeals erred in not finding additionally that it was improper to submit the Constitution on a "yes" or "no" basis. Both Petitions were denied by the United States Supreme Court.

On July 2, 1975, the trial continued before Judge Kanpp, with the presentation of the defendant's case. At its conclusion, Judge Knapp, from the bench, ruled that the specifications in the Court of Appeals' mandate had been met by the defendant, and he dismissed the action. (J.A. 116a, 117a) On July 28, 1975, Judge Knapp reversed his ruling, and awarded judgment in favor of the plaintiffs.(J.A. 118a, 119a)

STATEMENT OF RELEVANT FACTS

A. The Dissemination of Opposition Views

The Local 88 Newspaper of January-February 1970

At the resumption of the trial, testimony with respect to the publication and distribution of the newspaper published by the plaintiffs' local union, one element in the Court of Appeals' mandate, was presented by the defendant through the testimony of Captain Joseph D. Gaier, who was, at the time of the referendum, the President of the plaintiffs' local. (J.A. 39a)

Captain Gaier at the time of the referendum,was also opposed to the new Constitution (J.A. 40a) as was the entire administration of plaintiffs' local. (J.A. 40a, 47a)

All five delegates who represented the plaintiffs' local, Local 88, had, in fact, voted to reject the new Constitution when it was proposed at the Union's Convention. (J.A. 40a, 150a) Among such dissenting delegates was Lloyd Sheldon, one of the plaintiffs in this action. (J.A. 40a, 41a, 150a)

Local 88, the Union's New York local, published its own newspaper. (Deft's Exh. E, J.A. 150a) At the time of the 1970 referendum,there were approximately 2,300 members in Local 88. The entire Union had a total membership of some 9,500 to 9,800. (J.A. 41a) The January-February 1970 issue of the Local 88 newspaper contained numerous articles highly critical of the proposed new Constitution. (Deft's Exh. E, J.A. 150 a-158a) Prominently featured also were two pictures showing Captain Gaier and other officials of the Union, along with the plaintiff, Lloyd Sheldon, with captions stressing their objection to the proposed new Constitution. (J.A. 150a, 158a) One of the articles against the proposed Constitution bore plaintiff Sheldon's by-line (J.A. 154a)

Fourteen thousand copies of this issue were printed, far in excess of the Local 88 membership and in excess of

the entire MM&P membership. Captain Gaier testified that all members of Local 88 were mailed a copy of this newspaper to their home address, and five copies of the newspaper were mailed to each vessel under contract with the Union. (J.A. 41a, 42a)

The number of copies sent to each ship reflected the number of union members serving aboard the vessel. (J.A. 43a, 44a)

The members serving on the vessels to which the newspapers were sent were members from not only Local 88 but from other locals of the Union as well. (J.A. 44a)

Additional mailings of the newspaper were made. Bulk mailings were sent to each of the Union's locals, and bulk mailings were also sent to United Seamen's Service Clubs throughout the world. (J.A. 45a) In addition, direct mailings were sent to all Union members, not limited to the Local 88 membership, who had shipped or cleared through the Port of New York. That is, any union member who registered on the New York Shipping List would be required to fill out a personnel card containing his address. These members would be sent copies of the Local 88 paper. (J.A. 46a)

In addition to the President, Secretary-Treasurer, and Vice President of Local 88, the local also had officials known as patrolmen. The duties of the patrolmen consisted of boarding each vessel that entered the Port of New York, and in part,

meeting with union members and apprising them of union affairs. All of the Local 88 patrolmen were opposed to the proposed new Constitution. (J.A. 47a, 48a) Two such patrolmen, Ernest Hendry and James White, had by-lined articles in the January-February 1970 issue of the Local 88 Bulletin, opposing the proposed new Constitution. (Deft's Exh. E, J.A. 155a-157a)

Prominent in the objections to the new Constitution as described in the Local 88 newspaper, was a perceived undue concentration of power in the three International Officials, and an objection to the increase in membership dues to $300 a year commencing in October of 1970.

The page 1 article made the following observations:

> ". In the makeup of the General Executive Board where at present voting is by per capita, the voting power would be given to the 3 International officials. Under the present Constitution, these 3 have no vote with the exception of the International President who can vote to break the tie if one exists.
>
> . Under the new set-up membership dues would be increased to $300 per year starting in October, 1970.
>
> The $300 per year was an arbitrary figure approved by the delegates without any cost projection whatsoever.
>
> . Under the present Constitution, the per capita tax is voted on by the local executive officers.
>
> Under the new structure, the three international officials would have

> 50 per cent of the per capita vote. This would leave no voice for the majority of the membership in the Offshore Division."* (J.A. 151a)

Plaintiff Sheldon's by-lined article contained more pungent observations:

> "Consolidation of membership power is one thing - consolidation of the power of a handful of officials, or one official - is something else. One does not necessarily equate with the other.
>
> The restructuring change before this Convention will dilute the ability of the membership to exercise full and final authority over the Union. Where the highest level legislative, executive, judicial, and administrative bodies of any Union are not directly accountable to the membership for their actions, that membership must eventually lose control."
>
> (J.A. 154a)

The article of Patrolman Hendry was equally clear in spelling out the "evils" perceived in the new Constitution.

> "The votes of the Int'l Executive Committee were alloted, pro rata, to the Executive Officers of each Local. Under the proposed Constitution, the International Officials will have at least 50% of the votes in any General Executive Board Meeting. From zero to fifty percent is quite an increase in power - in an organization such as ours

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*This alleged improper concentration of power has, in any event, been eliminated by a subsequent amendment to the International Constitution. Under such amendment the members of the General Executive Board have only one vote each. (Deft's Exh. J)

it is tantamount to dictatorial control.

. . .

Your quarterly dues will also be increased upon adoption of this Constitution. The minimum Off-shore dues will be $300 in October 1970. Who knows what the minimum dues will be in 1972 or what the job opportunities will be in 1972 or next year for that matter. ... (J.A. 157a)*

The Local 88 Newspaper of March-April, 1970

Captain Gaier further testified that the next issue of the Local 88 newspaper, for March-April, 1970 received the same distribution as did the preceding issue. (Tr. 21) In this issue, Patrolman Jim White reported at the February 25, 1970 Local 88 membership meeting that he was taking an active role in campaigning against consolidation (Deft's Exh. F, J.A. 159a) and Patrolman Hendry reported that he finds little support on the vessels for the consolidation as proposed.(J.A. 159a)

Further actions of Local 88 as reflected in the minutes of the February 11, 1970 meeting published in the Local 88 newspaper, revealed Local 88 sentiments strongly opposed to the

*This further objection to the increase in membership dues to $300 has also been rendered nugatory by the passage of time. In 1975, the Offshore Division membership by referendum voted to further increase the dues beyond the $300 per year by an additional sum of 6% of earned vacation. (J.A. 51a, Deft's Exh. K)

new Constitution. (Deft's Exh. F, J.A. 161a)

The Local 90 Newspaper
The "Sextant"

The Union's Pacific Coast local at the time of the referendum was Local 90. It had its headquarters in San Francisco, and branch offices and shipping halls in Seattle, Washington, Portland, Oregon and Wilmington, California. (J.A. 66a)

Local 90 also published its own newspaper, The Sextant. At the time of the referendum, there were approximately 2,000 members of this local (J.A. 59a) Captain George Tuttle, First Vice President of Local 90 at the time of the referendum, gave testimony with respect to the Local 90 newspaper. He was instrumental in its publication during the period involved. (J.A. 67a-70a)

The press run of the newspaper during this period of time was 3,000 copies per issue.(J.A. 83a)

Each issue of The Sextant was mailed to the current address of all active members of Local 90. (J.A. 71a) In addition, it was mailed to the Offshore, Pilot and Inland Locals, and five copies were mailed to each vessel under contract to Local 90. (J.A. 71a, 72a) Copies were placed on tables in the various Union halls on the West Coast, and bundled copies were sent to the United Seamen's Service

Clubs overseas. (J.A. 72a) In addition, the Local 90 patrolmen or branch representatives distributed the newspapers to the officers on each of the vessels which paid off on the West Coast. (J.A. 72a, 73a)

The referendum took place at the height of the hostilities in Indochina, when a great many vessels were under charter to the Military Sealift Command carrying ammunition to the Far East. The ships paying off on the West Coast were those not only based on the West Coast, but also vessels under contract to the Atlantic and Gulf Steamship companies. The officers employed on these vessels were not limited to Local 90 members - they came from locals all over the United States. (J.A. 73a, 74a)

Local 90 had a rank and file Constitutional or consolidation committee which was 100% against the proposed new Constitution. (J.A. 79a, 80a)

In the Membership Comments section of the Local 90 newspaper, spirited and salty comments in opposition to the new Constitution were the order of the day. (J.A. 167a-176a) In the February-March 1970 issue, in particular, detailed membership comments, setting forth the salient provisions of the new Constitution and the writers' strident views against adoption were printed. (Deft's Exh. O, J.A. 170a, 174a)

One of the letters published in this February-March

1970 issue of The Sextant was the verbatim letter written by plaintiff Lloyd Sheldon to the International Officers which Sheldon demanded be published in the Union's official newspaper. (J.A. 172a, identical in text to Pltffs' Exh. 7, J.A. 142a, 143a)

The letter, as it appeared in The Sextant, bore the name of Harold H. Sahlin, with franks by four other members of Local 90. It was attributed as follows:

> "(The article above was written by a rank and file East Coast delegate to the New Orleans Constitutional Convention)" (J.A. 172a)

Captain Tuttle explained that it was a Local 90 requirement that letters be published only over the names of Local 90 members, and that each letter had to have a member's name for every 250 words. (Tr. 75)

With respect to this Local 90 procedure and Captain Sheldon's letter, Captain Tuttle testified as follows:

> "Mr. Sahlin as Chairman of this Committee wished this to be printed in the paper over Captain Sheldon's name. He was told at the membership meeting in assembly that we could not publish any letters from members of the locals, that if he wished to take that letter and put his signature on it and have the correct number of franks, we would be happy to publish it." (Tr. 75)

The Local 47 Disaffiliation

Views in opposition to the new Constitution were also held by the members of Inland Local 47, which was the largest of the Inland Locals, consisting of about 600 members. (Tr. 22, Deft's Exh. D)

Not only did the Local 47 delegates to the Constitutional Convention vote against the new Constitution, but the membership of Local 47 voted to disaffiliate from the International Organization of Masters, Mates and Pilots if the new Constitution passed. The disaffiliation resolution which was passed by the Local 47 membership in convention on March 6, 1970 (Deft's Exh. G, J.A. 162a-166a) spelled out their opposition to the new Constitution.

The resolution of Local 47 was self-executing, and upon the passage of the new Constitution by the Union membership at large, Local 47 thereupon became disaffiliated. (J.A. 162a)

B. The Events Since 1970

The new Constitution, which is the subject of this lawsuit, has been in existence since October 1970. The Union has operated under that document for over five years, during which time the Union has undergone a thorough and complete restructuring.

Prior to 1970, the Union was composed of semi-autonomous locals. The new Constitution revamped this structure completely, providing instead for a divisional structure, with the former locals and their individual membership rolls being eliminated. The new divisions as provided for in the Constitution are the Offshore Division, the Inland Division, the Pilots Division, the Government Employees' Division and the Shoreside Division. (Pltffs' Exh. 1, Pltffs' Exh. 2)

Captain Gaier testified to the many changes that have occurred during the five years since the date when the new Constitution became effective.

All of the former Offshore Locals, some nine in number, have been merged into the single Offshore Division. (Pltffs' Exh. 15) The local structure in the Offshore Division has disappeared, with Offshore members now all belonging to the single Offshore Division. (J.A. 56a, 57a)

As part of the elimination of the locals, the members of Local 90 voted to liquidate their assets. Some one and a half million dollars were refunded to the former members of Local 90 (J.A. 58a), and the buildings in Local 90 are now held in trust where they are to remain for the next forty years. The former membership of Local 20, in Galveston and Houston, voted to turn over their assets to the International, as did the members of Local 15. (J.A. 58a)

Further, the newly structured Offshore Division has closed the offices which had been in the Port of Wilmington, North Carolina and in the Port of Savannah, Georgia. (J.A. 55a) There has also been a downgrading and an elimination of positions in the Offshore Division. One job was eliminated in the Port of New York, and one was downgraded. (J.A. 55a) In the ports of Providence, Philadelphia, Baltimore, and New Orleans, there was a downgrading of one position each. (J.A. 55a)

Similar basic structural changes took place within two other divisions of the Union over this five year period. The former Inland locals, by two separate referendum votes, have consolidated into two regions; the West Coast Region and the East Coast Region of the Inland Division. (J.A. 52a, 53a) This resulted in the elimination of the separate Inland locals as was the case with the Offshore locals. The Pilots locals also conducted a referendum, voting to adopt a set of by-laws and forming the new Pilots Division, composed of all of the former pilot locals with the exception of two in the Panama Canal. (J.A. 53a) These former old pilot locals have also disappeared. (J.A. 57a)

With this restructuring has also come a change in the method by which the current Divisional officers have been elected. As provided in the new Constitution and Offshore

Division By-laws, there are no longer any local membership lists. All Offshore Division members now belong to the single subordinate body of the International, the Offshore Division. (Pltffs' Exh. 15) All of the current Offshore Division officers, who were elected to serve for the three year term 1975 through 1977, inclusive, were elected by the entire Offshore Division Membership rather than as previously, by the individual Local port membership. (Pltffs' Exh. 15)

Aside from the membership referenda creating the several divisions and adopting the respective Divisions' By-Laws, there have been three separate referenda since October 1970 held among the entire membership of the union by which amendments to the 1970 Constitution have been adopted. (J.A. 49a, 50a, Deft's Exhs. H,I,J) One such amendment in 1971 brought about an affiliation of the International Organization of Masters, Mates and Pilots with the International Longshoremen's Association. (Deft's Exh. H)

Another significant amendment to the new Constitution, affecting the basis by which the Union's highest governing body, the General Executive Board, casts its votes, became effective in January 1975. (Deft's Exh. J)

By this amendment, one major complaint of the plaintiffs that the three International officers exercised dictatorial control over the Union by reason of their ability to cast weighted

votes in the General Executive Board, was eliminated. The new voting structure allows only one vote per person to each member of the General Executive Board. This amendment to the Constitution reads as follows:

> "In Article VII, Section 1, delete both paragraphs of (a) and substitute the following:
>
> '(a) Each member of the General Executive Board shall have one vote and a majority of the votes cast at any meeting of the General Executive Board shall be necessary to adopt any resolution.'
>
> '(b) A majority of the General Executive Board members shall constitute a quorum.'"
>
> (Deft's Exh. J)

The other primary complaint of the plaintiffs, the increase in dues for all Offshore Division members to $300 per annum, has also been rendered moot. In January, 1974, the Offshore Division membership by referendum voted an additional increase in dues beyond the $300 per year, in the amount of 6% of earned vacation benefits. (J.A. 51a, Deft's Exh. K)

In short, the five year period during which the union had conducted its business under the new Constitution, and under the several subsequent amendments to that new Constitution and under the new Divisional structure, has seen a complete and fundamental change in the conduct of Union business, and a disappearance over this five years of the traces of the former local set-up. (J.A. 56a, 57a)

POINT I. THE VIEWS OF THE OPPONENTS TO THE NEW CONSTITUTION WERE DISSEMINATED SUFFICIENTLY SO AS TO SATISFY THE REQUIREMENTS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, AS DESCRIBED BY THE PRIOR MANDATE OF THIS COURT

The essential reason underlying this Court's prior reversal of Judge Knapp's judgment in favor of the defendant can be seen in the comments appearing in footnote 9 of the Court's original decision of May 28, 1974. The Court, in that footnote, made the following observation:

> "...In this case, however, the defendant union officials' stiff-necked refusal even to provide their opponents access to the membership mailing list rendered the referendum procedure so patently unfair that their conduct can fairly be deemed 'a denial of the [members'] equal right to vote in elections or referendums' Gurton v. Arons, supra., 339 F.2d at 374." Sheldon v. O'Callaghan, 497 F.2d at p. 1283.

Implicit in this statement was the Court's apparent belief that by denying access to the mailing list, all voices opposing the new Constitution had been effectively and completely cut off, and that no dissenting views were in any fashion being made known to the membership.

Upon the issuance of this Court's opinion, the defendant on June 3, 1973, filed a Petition for Rehearing and for Rehearing En Banc pointing out that the dismissal of the

action came at the end of plaintiffs' case that the Union did not have an opportunity to put in a defense, specifically, with respect to the wide distribution of plaintiffs' local Union newspaper among the union membership and that the views of the plaintiffs were in fact being disseminated.

Although the Petitions for Rehearing and for Rehearing En Banc were denied, the Court, sua sponte on June 14, 1975 issued an amendment to its prior Opinion stating, in part, as follows:

> "Defendants state, however, that if their motion to dismiss had not been granted, they would have presented evidence that a newspaper published by the plaintiffs' local union was widely distributed among the union membership, and that plaintiffs' views were in fact being disseminated.
>
> The Judgment must be reversed and the case remanded for further proceedings consistent with this opinion." 497 F.2d at p. 1283.

The Court, in its remand, was thus declaring that access to a mailing list in a union referendum which was not involved with an election of officers was not an absolute statutory right of the membership.* Rather, the Court was saying that

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*In view of the language of the amendment, it is not necessary in this brief to deal with the issue of whether or not, in the abstract, a union member has the right, under the LMRDA to access to a membership list in a union referendum which is not involved with an election of officers. It is the defendant's position that no such right exists, and a detailed review of

(cont.)

the absence of access to a mailing list did not automatically render a referendum invalid, but that compliance with the LMRDA as respects voting in a referendum which is not involved with an election could be found in something considerably less--if there was, in fact, a dissemination of views opposing the matter at issue, and, here, that the Local 88 newspaper was given "wide distribution."**

Following presentation of the defendant's case at the resumption of the trial on July 2, 1975, Judge Knapp, from the bench, ruled that the specifications set forth by the Court of Appeals had been met by the defendant Union, and he dismissed the case.

After rendering his decision dismissing the case, Judge Knapp asked counsel for the plaintiffs to advise him whether or not the plaintiffs planned to appeal from such ruling so that the parties, in such event, could submit to Judge Knapp their views on what the relief should be in the event such appeal was taken and the Court of Appeals reversed. (J.A. 116a, 117a)

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*(cont.) of the statute and its legislative history in support of this position appears in the Petition for Rehearing and for Rehearing En Banc filed on June 7, 1973 in connection with the prior appeal in this case.

** Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a)(1) provides:

"Equal Rights -- Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor

(cont.)

Counsel for the plaintiffs did in fact advise Judge Knapp that the plaintiffs intended to appeal, and it was after such advice that on July 28, 1975, Judge Knapp reversed his decision and gave judgment to the plaintiffs.

It is submitted that Judge Knapp's original decision was correct, and that the burden and specifications set forth by the Court of Appeals were in fact met, i.e., that the Local 88 newspaper was widely distributed and that the views opposing the new referendum were in fact being disseminated to the membership. And, as Judge Knapp initially found, there was, therefore, compliance with the requirements of the Labor-Management Reporting and Disclosure Act and this Court's mandate, and that the new Constitution had in fact been properly ratified and passed.

The Local 88 Newspaper

Judge Knapp made a finding of fact at the July 2 hearing that Captain Gaier's testimony was true, and that the Local 88 newspaper was distributed as he testified. (J.A. 110a)

Even on July 28, 1975, when Judge Knapp reversed his prior decision, he reaffirmed his finding that the testimony of

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**(cont.) organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

Captain Gaier was credible. (J.A. 128a)

Captain Gaier's testimony clearly showed that the Local 88 newspaper received the wide distribution that this Court's mandate spoke of. This distribution, set forth previously in this brief, may be summarized as follows:

- 14,000 copies printed, far in excess of the 9,500 to 8,800 total membership of the union.
- Direct mailing to home addresses of some 2,300 members of Local 88
- Direct mailings to home addresses of all union members, not limited to Local 88 membership, who had shipped or cleared through the Port of New York
- Direct mailing of the newspaper to each vessel under contract with the Union, with the number of copies sent to each ship reflecting the number of union members serving aboard the vessel.
- Bulk mailings to each of the union's locals.
- Bulk mailings to United Seamen's Service Clubs throughout the world.

An examination of the Local 88 newspaper (Deft's Exh. E, J.A. 150a-158a) leaves no doubt that it contained the views

of the plaintiffs in substantial detail in opposition to the new Constitution. The distribution among the membership, as testified to credibly by Captain Gaier, was in fact wide.

It is respectfully submitted that on the basis of the Local 88 newspaper alone, the mandate of the Court of Appeals and the burden of the defendant had been met, and the decision of Judge Knapp awarding judgment in favor of the plaintiffs, should be reversed.

The Local 90 Newspaper and The Local 47 Resolution of Disaffiliation

At the July 2 trial, the defendant union presented further evidence,beyond the publication and distribution of the Local 88 newspaper, reflecting additional dissemination to the membership of views in opposition to the proposed new Constitution. Although this additional material was admitted into evidence, Judge Knapp ruled that it did not satisfy the Court of Appeals mandate with respect to the dissemination of opposing views. It is respectfully urged that Judge Knapp was in error on this, and the Local 90 newspaper testimony and evidence and the Local 47 Resolution of Disaffiliation constitutes further probative evidence on the dissemination of opposition views, all in support and in satisfaction of the requirements of the LMRDA, as enunciated by this Court.

The Local 90 membership was some 2,000 in number. There were 3,000 copies printed of each issue published prior to and during the course of the referendum on the new Constitution. The testimony of Captain Tuttle on the publication and distribution of the Local 90 newspaper, was uncontradicted.

Captain Tuttle's testimony, previously set forth in the Statement of Relevant Facts, was that the newspaper was mailed to the current addresses of all active members of Local 90, that copies were mailed to all Offshore, Pilot and Inland locals, that copies were mailed to each vessel under contract to Local 90, that copies were sent to United Seamen's Service Clubs overseas, that copies were placed on the tables in the various union halls on the West Coast, and that the Local 90 patrolmen distributed the newspapers to the officers on each of the vessels which paid off on the West Coast, which distribution was to union members from all over the country and not limited to Local 90 people.

Captain Sheldon's opposition verbatim letter, although not over his signature, was published in the February-March issue of The Sextant. The membership comments, which were articulate and strongly antagonistic to the new Constitution (J.A. 167a-176a), set forth a broad spectrum of complaints about the proposed new Constitution. The comments also were far from shy in tone:

> "Now get this, Brothers, and hang on to your hats. The International President, International Vice-President and International Secretary-Treasurer will whack up the offshore per capita vote with the three Offshore Vice Presidents. A combination of any four of these individuals will pack enough voting power to control the union and none of them will be directly accountable to the membership for their actions.
>
> . . .
>
> When you realize the International President is to be named editor of the International rag and will be given a free hand in its use, you should get the picture. The provisions to fill vacancies of International Officers by General Executive Board action, instead of by membership referendum, will be further denial of the right of the membership to chose its leaders in a democratic fashion." (Deft's Exh. P, J.A. 175a)
>
> "These Constitutional shenanigans call for an Offshore dues increase to $300 per annum.
>
> "The wage increase planned for certain officials, high salaried presidential appointees, whose main job will be to tighten the screws on political control and other extravagant excess of top heavy bureaucracy will cost this membership a bundle if we are suckers enough to go for this proposition." (Deft's Exh. P, J.A. 175a)

During the course of argument with respect to the Local 90 newspaper, counsel for the plaintiffs argued that the opposition views set forth in the Local 90 newspaper, not being the specific views of the particular plaintiffs in this case,

could not act to satisfy the LMRDA's referendum requirements. We submit that this contention misinterprets the thrust of this Court's mandate.

Thus, for example, the plaintiffs in this case urged that the defendant union was obliged to give them space in the union newspaper for the presentation of their views. This Court in its prior Opinion held that there was no such right. (497 F.2d at page 1282) But let us assume arguendo, that the pre-1970 Constitution did grant access to the official publication to the membership for presentation of a point of view relating to matters submitted to referendum, as indeed, the new Constitution now does.(Pltffs' Exh. 2, p. 44)

Under those circumstances, if the union newspaper had selected not the letter sent in by a particular member, due to space limitations preventing the publication of all letters received, but instead printed a letter or letters containing substantively equivalent opinions on a referendum matter, it is obvious that this would comply with any fair referendum requirements under the LMRDA. Such a conclusion is signaled by the language of this Court in its prior decision wherein it stated:

> "A fair referendum under the facts of this case included the right of the members whose views were opposed to defendants' to have an opportunity to present their views to other members of the Union." 497 F.2d at p. 1282."

Surely, this would not impose a requirement on the Union that every letter of every dissenting union member must be published in the paper. It would only mean, at most, that a fair sampling of opposition views be published. This is exactly the situation with respect to the publication of The Sextant, where views strongly in opposition to the new Constitution were in fact presented to the membership.

Given the fact that this was not an election involving one candidate against another, but, rather, an issue relating to the adoption of a Constitution, it is not the identification of any particular member or group of members that the LMRDA has concern with, but, rather, only the substantive views concerning the issue. And in this case, the substantive views against the adoption of the new Constitution were clearly contained in The Sextant.

The Local 47 Resolution of Disaffiliation, passed by the membership in convention on March 6, 1970 was also a clear example of active membership views against the new Constitution. (Deft's Exh. G, J.A. 162a-166a) Judge Knapp was in error in not considering this document, and the voice of the Local 47 membership, as further examples of satsifaction of the LMRDA requirement by reason of opposition views being disseminated to the membership.

It is submitted that the evidence of distribution of

the Local 88 newspaper, found credible by Judge Knapp, was sufficient to satisfy the LMRDA requirements in this referendum. When coupled with the further evidence relating to the Local 90 newspaper and the Local 47 disaffiliation resolution, it is clear that the membership was in fact well apprised of the views in opposition to the new Constitution, and that the referendum procedures were, in all respects, consonant with the requirements of the LMRDA.

POINT II. EVEN IF THE LMRDA REQUIREMENTS SURROUNDING THE REFERENDUM WERE NOT COMPLIED WITH, THE EVENTS WHICH HAVE TAKEN PLACE SINCE 1970 CONSTITUTE A PROPER RATIFICATION OF THE NEW CONSTITUTION, NUNC PRO TUNC

It is submitted, from the foregoing discussion, that the LMRDA requirements as described by this Court, surrounding the Union's referendum on the new Constitution were complied with, and that the judgment of the District Judge should be reversed and the action dismissed. However, even if it is found that the LMRDA requirements had not been complied with, it is submitted that the events which have taken place since 1970 constitute a proper ratification of the new Constitution nunc pro tunc and that such circumstances, therefore, also warrant a reversal of the judgment below and a dismissal of the action.

We have previously described in this Brief, from the evidence produced at the trial, the myriad ways in which the entire union structure has been changed over the past five years while the new Constitution has been in effect. The old local structure has vanished along with individual membership in a particular local and the election by a local of its own individual officers, which had been the keystone of the makeup of the union prior to 1970. All of the eggs over this five year span of time have been thoroughly scrambled.

Moreover, and most significantly, since the 1970 ratification of the new Constitution, there have been three separate subsequent amendments thereto through unchallenged referenda.

Aside from the very signifcant affiliation of the union with the International Longshoreman's Association, which became effective in 1971, the amendment of January 1975, which brought into being a one-man, one-vote ballot on the Union's General Executive Board, eliminated one of the chief complaints of the plaintiffs to the original new Constitution, that of an alleged improper, inordinate power in the hands of the three International officers by reason of their ability to case weighted votes.

Similarly, the complaint about the dues increase of the Offshore Division to $300 per man per year has also vanished.

In January 1974 the Offshore Division membership voted an additional increase in dues beyond the $300 per year, in the amount of 6% of earned vacation benefits. (Deft's Exh. K, J.A. 51a)

Thus, the major objections which the opponents to the new Constitution had raised in 1970, and which they desired to make known to the union membership in that referendum have, in the fullness of time, been met by remedial subsequent amendments approved by membership referenda.

Moreover, since the 1970 referendum, there has been an almost complete change in the Union's hierarchy.

The three 1970 International officers, O'Callaghan, Crooks and Caldwell, named as the nominal defendants in this lawsuit are now all out of office. (Captain Crooks died in 1970). Frank Scavo, an opponent of the new Constitution and Secretary-Treasurer of Local 88 at the time of the referendum (J.A. 150a, 152a, 153a, 158a) is now International President.

If objectionable parts still remain in the new Constitution, as amended to date, there is provision within the Constitution for orderly amendment thereof (Pltffs' Exh. 2, Article X) which, in fact, has taken place three times since 1970.

With the total change in International officers, and with an almost complete change in all of the union's other elective offices since 1970, an entirely different union

hierarchy now exists. There are no incumbent union officials who carry the "stiff-necked" taint attributed by this Court to these 1970 International officers. Under the new Constitution, the membership now has the right to fair and reasonable access to the Union's newspaper for presentation of views regarding matters submitted to referendum. (Pltffs' Exh. 2, Article XI, Section 5)

It is submitted that these events, the passage of five years and, in particular the three amendments to the 1970 Constitution, all or individually, constitute a proper ratification of the new Constitution nunc pro tunc, and on that basis, the judgment of the District Court should be reversed, and the action dismissed.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the District Court be reversed, and that the action be dismissed.

Dated: New York, New York
November 5, 1975

Respectfully submitted,

MARVIN SCHWARTZ, P.C.
Attorney for Defendant-Appellant
243 Waverly Place
New York, New York 10014

BURTON M. EPSTEIN

Of Counsel

Letter dated January 15, 1976 to Motley, J.

3123a

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January 15, 1976

Hon. Constance Baker Motley
United States District Judge
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Re: Hodgson v. International Organization
of Masters, Mates and Pilots
72 Civ. 5031

Dear Judge Motley:

In response to the letter of November 25, 1975 by Dennison Young, Jr. and the letter of December 3, 1975 by Burton M. Epstein, we write on behalf of Frank T. Scavo, Gerald Johnson and Timothy Brown who you have authorized to appear in this matter as amicus curae to set forth the position of our clients with respect to the issues raised in Mr. Young's letter and the responses thereto by Mr. Epstein.

As set forth on page three of Mr. Epstein's letter, our clients Frank T. Scavo and Gerald Johnson have been elected President and Executive Vice President of the International Organization of Masters, Mates and Pilots. We believe that the intervening election should be held by the Court to moot the challenge in the above-captioned case and we believe that the Steel Workers case cited in Mr. Young's letter supports rather than contradicts the position set forth in our prior

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Memorandum of Law to the effect that a subsequent intervening election neither automatically has the effect of mooting a challenge by the Secretary of Labor to a prior election nor does the contrary automatically follow. As we pointed out in our prior Memorandum, the Glass Bottle Blowers case held that on the facts of that case the subsequent intervening election should not be held to moot the challenged election in view of the fact that the intervening election was tainted by the misconduct in the prior election. Thus, in footnote 3 of the Steel Workers case, the court stated "there appears to be no substantial reason for distinquishing this case on the ground that the complainant himself has secured the office in the second election that he sought in the challenged election." This was clearly true in the Steel Workers case, as the basis of the challenge was that 96.5% of the Union's membership was ineligible to hold office under the eligibility requirements of the Union as a result of meeting attendance requirements. These same requirements applied in both the challenged election and the subsequent election and therefore, it is apparent that both elections were tainted by the same illegality. The fact of the matter is that the subsequent election in the instant case was totally free of any taint whatsoever.

Subsequent to the challenged election, substantial changes were made in the By Laws of the International Organization of Masters, Mates and Pilots, specifically including matters challenged in this case. Moreover, the issue of the use of the Union newspaper for campaigning purposes which is basic in this case is totally absent with respect to the intervening election. Inasmuch as the incumbent President and Executive Vice President who were the beneficiaries of the alleged illegal campaigning in the 1971 election lost the 1974 election, it is clear that any tainting of the 1971 election was overcome in the 1974 election.

The Steel Workers case specifically deals with the question of whether there is a "substantial reason" for mooting a case based on an intervening election. Although the facts in the Steel Workers case presented no such substantial reason, it is clear that the facts in this case do present an extremely substantial and

and persuasive reason for holding that the case is mooted by the intervening election.

With respect to the AGVA case, cited by Mr. Young, my clients take no position whatsoever. For the reasons set forth above, and set forth in our Memorandum of Law, it now is clear that the challenge to the 1971 election should be dismissed as moot. My clients no more condone any misconduct which may have occurred in connection with the election of 1971 than did the members of the International Organization of Masters, Mates and Pilots in ousting the principal beneficiaries of such alleged misconduct. The intervention of the Court would be superfluous and mischievous where the Union has cleaned its own house.

In the event, however, that this Court should determine that misconduct occurred in the 1971 election and that, despite the outcome of the 1974 election, nonetheless, the issue has not been rendered moot, then it is respectfully urged that any new election ordered by the Court be the next regularly scheduled election by the Union in 1977 and that the results of the 1974 election continue pending the conclusion of such regularly scheduled next election.

Respectfully,

JAFFE COHEN & CRYSTAL
Attorneys for Frank T. Scavo, Gerald Johnson and Timothy Brown as Amicus curae

By: Ernest Allen Cohen

EAC:lcs
cc: Dennison Young, Jr.
Marvin Schwartz, Esq.
Mr. Frank T. Scavo
Mr. Gerald Johnson
Mr. Timothy Brown

Letter dated December 3, 1975 to Motley, J.

3126a

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December 3, 1975

HAND DELIVERED

JUDGE MOTLEY'S CHAMBERS

Hon. Constance Baker Motley
United States District Judge
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Re: Hodgson v. International Organization of Masters, Mates and Pilots
72 Civ. 5031 (CBM)

Dear Judge Motley:

This letter is sent in brief reply to the letter to you dated November 25, 1975, from Dennison Young, Jr., the Assistant U.S. Attorney in charge of the above captioned case.

The cases cited by the government add nothing further in support of the arguments submitted by the Department of Labor, and, more significantly, add nothing to rebut what the defendant Union has heretofore set forth in opposition to the government's Motion for Summary Judgment and in support of the Union's independent Motion for Summary Judgment dismissing the lawsuit.

The opinion of Judge Lasker in the AGVA case, 74 Civ. 3004, is not only not controlling of the issue, but is readily distinguishable from the case before Your Honor.

A simple examination of that part of the material sent by candidate Singleton, quoted by Judge Lasker in his decision, clearly shows the material there to be completely different from the material in the instant case. The passage quoted by Judge Lasker, which he found to be clearly "campaign literature" reads as follows:

> "Do not allow these 'Office Grabbers' to insult your intelligence with 'Election Promises' they make in order to gain your support." (Opinion page 1)

A review of the materials alleged by the government in the instant case to be campaign literature shows that they in no way approach the clear campaigning aspect of the Singleton material found in Judge Lasker's case.

Moreover, as we have pointed out at great length in our prior papers, the documents here complained of pertained directly to a matter of vital significance that was contemporaneously going on within the Union - the balloting on the proposed affiliation with the International Longshoremen's Association. This second factual difference further removes the AGVA case from having any relevance to the case before Your Honor.

The Steel Workers case from the Seventh Circuit referred to by Mr. Young similarly adds nothing further to support the government's position.

As footnote 3 indicates the issue of mootness was not litigated by the parties but was raised sua sponte by the Court of Appeals. No argument was presented by the defendant Union on the issue of mootness, as the defendant Union has done in this case. The Seventh Circuit in the Steel Workers case simply cited as its authority on the issue of mootness the Glass Bottle Blowers case, without going into any discussion of the principles enunciated in that case.

We would also like to bring Your Honor up to date on the results of the run-off election for the positions of President and Executive Vice President of the Union which was still pending at the time of submission of the prior papers.

In the run-off election, Captain O'Callaghan, the incumbent, was defeated by Captain Frank Scavo, and Captain Caldwell, the incumbent Executive Vice President who ran on the O'Callaghan slate was also defeated. Thus, the intent of the Glass Bottle Blowers case has in fact been fulfilled and vindicated, since neither of these incumbents was in fact able to perpetuate his control in the succeeding election.

The Union's arguments in opposition to the Department of Labor's Motion for Summary Judgment and in support of its own independent Motion for Summary Judgment Dismissing the Complaint remain meritorious, and it is respectfully urged that the Court render its decision dismissing this case.

Respectfully yours,

MARVIN SCHWARTZ, Attorney
for Defendant International
Organization of Masters,
Mates and Pilots

By: Burton M. Epstein
Burton M. Epstein

BME:eml

CC: Dennison Young, Jr., Esq.
Ernest Cohen, Esq.

Letter dated November 25, 1975 to Judge Motley

3139a

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

DY:bj

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

November 25, 1975

BY HAND

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
United States Courthouse
Room 2001
Foley Square
New York, New York 10007

RE: Hodgson v. International Organization of Masters, Mates and Pilots
72 Civ. 5031 (CBM)

Dear Judge Motley:

The Government, as you know, has moved for summary judgment in the above matter. Pursuant to 29 U.S.C. §§ 481, et seq, we seek a court-ordered, new election of union officers supervised by the Secretary of Labor.* Our motion focuses on five of the many violations the union committed during the course of the 1971 election. We need show that only one such violation occurred and that it may have affected the outcome of the election, for the Court to grant the Secretary's motion.

In response to our initial motion papers, you may remember the union cross-moved for summary judgment. It did so with respect to certain additional violations the Government alleged were committed but for which the Government found no need to seek summary judgment. By letter of March 3, 1975 Your Honor agreed with our suggestion that consideration of the union's cross-motion be held in abeyance pending a decision on our summary judgment motion.

* The present Secretary of Labor is John T. Dunlop. May we request that pursuant to Rule 25(d), Fed.R.Civ.P. the caption of this matter be changed to reflect the name of the new Secretary as the plaintiff.

Since only one violation need be established it was in the interest of judicial economy and in the hope that this union could be set on a more normal course as quickly as possible that we recommended we proceed in this fashion. Since then all further legal proceedings on this case have been held in abeyance pending the outcome of the Government's motion.

We are now informed that Your Honor has established a pre-trial schedule for a number of cases on your docket in anticipation of bringing those cases to trial beginning April 1, 1976. In view of our summary judgment motion and the above-mentioned stay of legal proceedings, it occurs to us that our case against the IOMM&P must have been included inadvertently on your list of cases subject to that schedule (#6 on the list). Certainly, in the event summary judgment were denied, the Government would abide by a similar pre-trial schedule if the details of your opinion warranted such effort. We continue to believe, however, that our motion is exceptionally strong and should be granted, and that there will be no further need to engage in elaborate, possibly acrimonious, and further delaying pre-trial efforts.* Unless we hear otherwise from Your Honor we are inclined to continue to await the outcome of our summary judgment motion.

Additionally may we take this opportunity to bring to your attention opinions in two cases which may be of further assistance to the Court in deciding our motion. One is Brennan v. Local 3489, United Steelworkers of America, et al., ___ F.2. ___, 89 L.R.R.M 3211 (7th Cir. 1975), (Slip opinion attached) decided August 5, 1975 by the Seventh Circuit. The other is a memorandum opinion by Judge Lasker handed down in a case styled Brennan v. American Guild of Variety Artists, AFL-CIO, 74 Civ. 3004 (S.D.N.Y.) (Opinion attached). Both cases further support various points we stressed in our motion papers.

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* Before making our motion you may recall the Government had to seek the assistance of the Court on four separate occasions in connection with different aspects of discovery, three times by Order to Show Cause.

The Seventh Circuit case supports our legal position that intervening union elections unsupervised by the Secretary do not moot cases challenging prior elections - and this is so despite the fact that incumbant officers may have been voted out of office in intervening elections or even if the complainant who triggered the Secretary's action in the first instance may have been voted into office.* Local 3489, slip op. at p. 3, n.3.

Judge Lasker's opinion granting summary judgment for the Government strongly supports our positions regarding the IOMM&P's "Newsletter" and "Eleven Pledges", that these documents were in effect campaign literature distributed in violation of 29 U.S.C. §§ 481(c) and (g).** In the case before Judge Lasker, as in the instant case, the materials distributed by the defendant union were held to be campaign literature in the context of surrounding events and by the character of the material itself.

The Secretary feels strongly that despite the fact that the defendant union has conducted an intervening election, the instant action should go forward.*** In this way, the Government ensures as best as possible that the purposes of the Labor Management Reporting and Disclosure Act are fulfilled and honors the faith union members have that an impartial Secretary will pursue these matters to a just conclusion.

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* See Point VI of our initial Memorandum (filed December 17, 1974) and Point II of our Reply Memorandum (filed May 23, 1975). The instant action challenges the results of the 1971 election. The union did conduct an unsupervised election in 1974 whereby some of the incumbants from 1971 were ousted. As elaborated upon in Point II of our Reply Memorandum the results of the 1974 election have no bearing on the instant case.

** See Point II of our initial Memorandum and Point III of our Reply Memorandum.

*** In passing we note also that a second action brought by the Secretary contesting certain aspects of the 1974 IOMM&P election of officers is before Your Honor as well (75 Civ. 2095). Pre-trial proceedings thereon have been held in abeyance too, for there would be no need to pursue that case if our summary judgment motion herein is successful.

If we can offer any further assistance, we of course will be delighted to do so.

Respectfully,

THOMAS J. CAHILL
United States Attorney

By: Dennison Young Jr.
DENNISON YOUNG, JR.
Assistant United States Attorney
Telephone: (212) 791-1969

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MEMORANDUM

74-2231

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PETER J. BRENNAN, Secretary of Labor, Department of Labor,

Plaintiff,

- v -

AMERICAN GUILD OF VARIETY ARTISTS, AFL-CIO,

Defendant,

PENNY SINGLETON and EDDIE RIO,

Additional Defendants.

----------X

74 Civ. 3004

MEMORANDUM

#41631

APPEARANCES:

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Attorney for Defendant Eddie Rio

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LASKER, D.J.

The motion for summary judgment is granted. Counsel for the defendant Rio has indicated by letter of December 20th, that he does not oppose the motion. Defendant Singleton submits the affidavit of her attorney in opposition to the motion. He contends that no violation of the statute has occurred because the mailings by her:

1) were not campaign literature;

2) were sent as report and comment to the membership of the Union;

3) were sent as part of the usual newsletter mailed to the membership;

4) were sent at a date in advance of the order for the holding of the election;

5) were sent six months prior to the election which time is so far in advance of the election as to have no effect on the election.

The arguments are unpersuasive.

First, the material issued by Singleton clearly was campaign literature as is indicated, for example, by the following passage: "Do not allow these 'Office Grabbers' to insult your intelligence with 'Election Promises' they make in order to gain your support." This

colorful exhortation clearly contemplates the election to come, which all the parties were keenly aware was already in the cards.

Second, the character of the material is not merely that of a report and comment or part of a normal newsletter. See Yablonski v. United Mine Workers of Am., 305 F.Supp.868, 871 (D.D.C. 1969), Wirtz v. Independent Workers Union of Fla., 272 F.Supp. 31 (M.D. Fla. 1967), Hodgson v. Liquor Salesmen's Union, Local No. 2, 334 F. Supp. 1369 (S.D.N.Y. 1971). The fact that the material was issued in advance of the order to hold a new election, or some months prior to the scheduled election date is no defense under the statute. Where the material issued is clearly of an electioneering character, it is not redeemed because it is sent out well in advance of the election.

Singleton's final assertion that her alleged violation of 29 U.S.C. §481(c) is cured because Rio undertook similar conduct is without merit. It would be an ironical construction of the statute to permit rival candidates to use union funds improperly at the expense of the members whom the statute was intended to protect; and in any event, the failure to establish machinery for distribution of campaign literature by other potential candi-

dates who might choose to enter the fray constitutes a violation of 29 U.S.C. 481(c). Wirtz v. AGVA, 267 F. Supp. 527, 548 (S.D.N.Y. 1967).

Summary judgment is granted holding defendants Singleton and Rio to have violated 29 U.S.C. §§481(c) and 401(c). In the event that either individual defendant objects to the form of judgment enclosed in the letter of December 18th of plaintiff's counsel, he or she shall submit proposed counter-judgments within five days of the filing of this memorandum.

Dated: New York, New York
December 24, 1974.

Morris E. Lasker
U.S.D.J.

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1639

PETER J. BRENNAN, Secretary of Labor,
Plaintiff-Appellant,

v.

LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana—No. TH 70 C 117
JAMES E. NOLAN, *Judge.*

HEARD APRIL 3, 1975 — DECIDED AUGUST 5, 1975

Before CUMMINGS and PELL, Circuit Judges, and PERRY, Senior District Judge.*

CUMMINGS, Circuit Judge. The Secretary of Labor filed this action for declaratory and injunctive relief pursuant to Title IV of the Labor Management Reporting and Disclosure Act ("Act" or "LMRDA"), 29 U.S.C. § 401 *et seq.* The complaint alleged that a June 22, 1970, election of officers of defendant union[1] was void because the

* Senior District Judge J. Sam Perry of the Northern District of Illinois was sitting by designation.

[1] Local 3489, United Steelworkers of America, AFL-CIO. Subsequently the parent international union, United Steelworkers of America, AFL-CIO, intervened as an additional defendant.

BEST COPY AVAILABLE

union had failed to elect its officers by secret ballot and had imposed an unreasonable candidacy qualification, thus violating Sections 401(b) and 401(e) of the Act.[2] The district judge disagreed and dismissed the complaint. We reverse.

The membership of the Union is composed of the production and maintenance employees of the Stran Steel Corporation of Terre Haute, Indiana. At the time of the election, there were 660 members in good standing eligible to vote. However, pursuant to rules of the Local Union and its parent, the following requirements were established for eligibility for office in the Local:

1. Membership in good standing for 24 months immediately preceding the election;
2. Employment in a place within the jurisdiction of the Local Union;
3. Attendance at least at 18 of the 36 regular monthly meetings preceding the election unless union activities or working hours prevented attendance.

The third requirement was dictated by the following provision of the International Union's constitution:

> "No member shall be eligible for election as a Local Union Officer or Grievance Committeeman unless
>
> * * *
>
> "He has attended at least one-half (½) of the regular meetings of his Local Union for thirty-six (36) months previous to the * * * election unless his Union activities or working hours prevented his attendance." (Article VII, Sec. 9.)

[2] Section 401(b) (29 U.S.C. § 481(b)) provides:

"Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing."

In pertinent part, Section 401(e) (29 U.S.C. § 481(e)) provides:

"In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof."

From June 1967 to May 1970, the Local Union conducted 36 monthly meetings, with an average attendance of 47 members per meeting. As a result of the meeting attendance rule, 96.5% of the Local Union's membership was ineligible to hold office. Ten of the 23 members who were found eligible were incumbent office holders. Following the May 17, 1970, nomination meeting, two of the nominees were informed that they were ineligible for union office because they had attended an insufficient number of union meetings. Ultimately, there were only 13 candidates on the ballot running for ten offices and six of these candidates ran unopposed.

After the June 22, 1970, election of officers, Bernard Frye,[a] a defeated candidate for the presidency, filed a protest with the Local Union, claiming that the meeting attendance rule was unreasonable and that the vote had not been by secret ballot. The Union denied his protest and he appealed to the International Union's executive Board. Because his protest was not acted upon by the Executive Board within three months (29 U.S.C. § 482(a)(2)), Frye filed a written complaint with the Secretary of Labor, prompting the present litigation.

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[a] Frye was ultimately elected president of the Local Union on June 12, 1973, and at the time of the filing of the briefs here was serving in that capacity. Although neither party has raised the question of mootness on appeal or in the court below, the mere recitation of the fact that the complainant [illegible] to the [illegible] election, eventually won the [illegible] sought then and is now serving in that capacity is sufficiently suggestive of mootness problems to merit a brief discussion by this Court.

In *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, the Supreme Court held that where the Secretary of Labor has proved a Section 401 violation that may have affected the outcome of an election, an intervening unsupervised election for the same offices does not deprive the Secretary of the right to a court order voiding the challenged election and directing that a new election be held under his supervision. There appears to be no substantial reason for distinguishing this case on the grounds that the complainant himself has secured the office in the second election that he sought in the challenged election. Thus if the June 12, 1973, election was unsupervised, this case is on all-fours with *Glass Bottle Blowers* and clearly not moot. Our review of the transcript of the hearing below leads us to believe that the Secretary did not supervise the June 12, 1973, election. It is therefore unnecessary to decide whether this case would be moot if a supervised election had been held since the challenged election. See *Brennan v. Silverplate District Lodge No. 50*, 503 F.2d 800, 803-804 (9th Cir. 1974).

The district court filed an unreported memorandum opinion in favor of defendants. In its opinion, the court stated:

> "The meeting attendance qualification * * * is designed to (1) insure that candidates have demonstrated an interest in union affairs prior to election and are therefore likely to continue to do so, if elected, and (2) that candidates will, if elected, be able to more knowledgeably fulfill their duties."

Therefore, the court concluded that the meeting attendance rule was a reasonable qualification within the meaning of Section 401(e) of the Act (note 2, *supra*). The court also held that the Union's failure to provide voting booths or other means of insuring secrecy during the voting did not violate Section 401(b) of the Act (*idem*), emphasizing that "the evidence did not indicate that the lack of a voting booth [subsequently acquired by the local union] or similar apparatus for secret voting may have affected the outcome of the election."

Reasonableness of Attendance Requirement

As noted, a member of the defendant union is not eligible for election to office unless he has attended 18 of the 36 regular monthly meetings preceding the election, unless union activities or working hours prevented attendance. This requirement must be tested in light of Section 401(e) of the Act, which makes "every member in good standing" eligible for office, subject to Section 504 of the Act "and to reasonable qualifications uniformly imposed." Section 504 prohibits members of the Communist Party and persons convicted of certain crimes from holding office unless certain conditions are met (29 U.S.C. § 504). This provision is not involved in this appeal. Further narrowing the issue, the Secretary does not seriously contend that the 18 of 36 rule was not uniformly applied. Thus the question before us is whether the meeting attendance rule is a reasonable qualification. We hold that it is not.

The construction of Section 401(e) was also before us in *Brennan* v. *Independent Lift Truck Builders Union*, 490 F.2d 213, 217 (7th Cir. 1974). Applying the admoni-

tion in *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 499, that "Congress plainly did not intend that the authorization in § 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach," we held that it would not be a reasonable qualification to bar a member from eligibility for office where he was discharged by an employer and was actively contesting the discharge.

In *Hotel Employees*, the Supreme Court struck down a union by-law which required major office-holders to be selected from members who had previously been office-holders. To support this conclusion, the Court relied on the legislative history of Section 401(e) and its wording that "every member in good standing shall be eligible to be a candidate and to hold office * * *." In so ruling, the Court stated:

> "This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for office. Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents." 391 U.S. at 499.[4]

Later in the *Hotel Employees* opinion, Justice Brennan observed that because the objective of Title IV of the Act (29 U.S.C. §§ 481-483) is to insure free and democratic elections, it was plain that a candidacy limitation rendering 93% of union members ineligible for office "can hardly be a reasonable qualification." 391 U.S. at 502. Here the meeting attendance rule disqualified 96.5%[5] of the Local Union's membership from office, so that it cannot be deemed a reasonable qualification either. We

[4] Note 8 has been omitted from the foregoing quotation; it cited 29 U.S.C. §§ 431(c) and 411(a)(1) as provisions stressing members' freedom to nominate candidates.

[5] Of the Union's 660 members, one member was found eligible by a combination of meeting attendance and work credits, and 22 members were eligible by virtue of meeting attendance alone. This resulted in disqualifying 96.5% of the membership at this election.

need not decide whether the 18 of 36 rule is *per se* unreasonable because its effect of severely restricting the number of potential candidates for union office shows it to be clearly unreasonable in this case. Furthermore, we note that of the 23 persons found to be eligible for office in the 650-person Local, ten were incumbent office-holders. Since Section 401(e) was intended to curb the possibility of abuse by an entrenched leadership, whether benevolent or not,[6] a restriction that results in almost half of those eligible to be candidates in a local of this size also being incumbent office-holders is surely suspect.

No particular percentage is accorded talismanic properties under the Act, so that the courts need not hold a union rule or combination of rules that fails to qualify such an arbitrary percentage of members as potential candidates *per se* unreasonable. Rather, the entire fact situation surrounding the election is to be examined in making the reasonableness determination. See 29 C.F.R. § 452.38 (1974). Of course, if a very high percentage of the membership is disqualified from seeking union office by a rule, as was the situation here, that fact alone may justify a finding that the rule is unreasonable. As stated by Judge Tone in *Brennan v. Local 3911, United Steelworkers of America*, 372 F.Supp. 961, 967 (N.D. Ill. 1973), in view of its decision in *Hotel Employees*, "It seems apparent that the Supreme Court would not regard the Steelworkers meeting attendance requirement in its present form as a reasonable qualification."[7]

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[6] *Hotel Employees, supra*, at 303.

[7] In *Local 3911*, Judge Tone rendered judgment for defendant union because the plaintiff had not fulfilled the statutory intra-union exhaustion requirements. Because of the possibility of reversal by a reviewing court, the then district judge indicated how he would have ruled had he reached the merits. Finding the Supreme Court's *Hotel Employees* decision controlling, he held that the disqualification of 94.7% of the membership due to the 18 of 36 rule proved the rule unreasonable under Section 401(e). 372 F.Supp. at 967.

This facet of the decision in *Local 3911* was cited with approval in *Brennan v. Local Union No. 639, International Brotherhood of Teamsters*, 494 F.2d 1092, 1098-1100 (D.C. Cir. 1974), where the Court of Appeals for the District of Columbia affirmed the ruling of the district court that a meeting attendance requirement, which disqualified 97% of the membership from potential candidacy, could not be applied in a coming election. The court noted, but did not follow, the contrary view expressed in *Brennan v. Local 5721, United Steelworkers of America*, 489 F.2d 884 (6th Cir. 1973). Likewise, to the extent that

As the district court recognized, the LMRDA "was expressly enacted to curb the abuses of entrenched leadership." The defendants' meeting attendance rule perpetuates that abuse on the facts of this case. Because of the rule, members of the defendant Local who wish to run against incumbent officers might have to plan their campaigns 18 months ahead of the triennial elections in order to acquire 18 attendance credits. The need for such long-range planning would help to keep incumbent leaders in office. Unions undoubtedly have members with the requisite skills to hold office who have been sufficiently content with the directions taken by the union leadership for a time so that they felt no need to participate in routine meetings. Yet the 18 of 36 rule could prevent such members from becoming candidates even where they had been attending all the meetings and actively opposing the policies of the incumbent officers for over a year. Moreover, new members can qualify as members in good standing after two years. However, in order to challenge incumbents, they would have to attend 18 out of 24 meetings in those two years. Again this requirement favors incumbents.

Defendants argue that the Secretary's position contradicts a provision in his manual on the Act.[7] The short answer is that the manual is now obsolete. See 29 C.F.R. § 452.38 (1974). In any event, the meeting attendance

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[1] (Continued)

Local 5724 is inconsistent with our decision here (in *Local 5721* only 84.8% were disqualified by the 18 of 36 rule), we respectfully disagree with the Sixth Circuit. *Wirtz v. Local 153, Glass Bottle Blowers Assn.*, 405 F.2d 176 (3d Cir. 1968), on remand from the Supreme Court, 389 U.S. 463, also appears to be in conflict with the Sixth Circuit, although in *Local 153* the facts involved a 75% attendance requirement over two years that disqualified 97% of the union membership, so that it might be distinguished on both the face of the rule and its practical effect from *Local 5724*.

[7] LMRDA Interpretive Manual § 422.250, which provided:

"PARTICIPATION IN UNION AFFAIRS"

"Qualifications reasonably designed to assure that candidates have participated in the affairs of the union and are sufficiently familiar with the industry in which the union operates would not be considered unreasonable in ordinary circumstances, if uniformly imposed. In the absence of knowledge of any special circumstances which cast doubt upon the validity and reasonableness of any of the qualifications they are not to be considered unreasonable in themselves."

rule at issue here disqualified a very high percentage of the membership from holding office, thus constituting "special circumstances which cast doubt upon the validity and reasonableness" of the rule within the guideline expressed in that manual.

Defendants also rely upon Section 422.206 of the same obsolete manual which provided that a two-year-50% meeting attendance requirement was not unreasonable. The Secretary has explicitly abandoned this position in a new regulation which provides that the reasonableness of a meeting attendance rule must be determined "in the light of all the circumstances of the particular case, including * * * the number or percentage of members who would be rendered ineligible by its application." 29 C.F.R. § 452.38 (1974).[7] This regulation therefore reinforces the Secretary's policy typified by the filing of this lawsuit. Moreover, since the three-year rule can be 50% harsher as to the number of meetings which a member must attend to qualify for office and as to the time limitations imposed on his decision to seek office, the reasonableness of the two-year rule does not determine the reasonableness of the three-year rule.

As in *Hotel Employees*, defendants attempt to defend their restriction by various argument in its favor. Thus they assert that they are attempting to insure that candidates have demonstrated an interest and concern in union problems and would be sufficiently familiar with them to fulfill the duties of office. Similar arguments were rejected in *Hotel Employees* where the Court noted that Congress designed Title IV "to curb the possibility of abuse by benevolent as well as malevolent entrenched leadership" (391 U.S. at 593). Defendants also assert that the meeting attendance rule fosters large turnouts at union meetings. However, according to the stipulation below, the average meeting attendance of this Union was 47 members out of 660. Such an attendance record would certainly not justify disqualifying 93.5% of members from holding office.

[7] Subparagraph (b) of the same regulation summarizes several court decisions holding particular meeting attendance requirements to be unreasonable.

In the court below, the Secretary showed that only one other national union has specified a three-year period during which a member must attend a specified number of meetings to qualify for candidacy. Surely this statistic belies defendants' claim that the rule in question is necessary to assure competent union leadership. The right of members to nominate and vote for candidates of their choice (29 U.S.C. §§ 411(a)(1) and 401(e)) would be seriously diluted if this rule were to be sanctioned. In our view, it is not a "reasonable qualification" for office under Section 401(e) of the Act.

Maintenance of Secret Ballot

The Secretary also argues that this election should be set aside and a new supervised election ordered under Section 402(c) of the Act (29 U.S.C. § 482(c)) on the additional ground that this Local Union failed to elect its officers by secret ballot in violation of Section 401(b) of the Act (note 2, *supra*). As defined in Section 3(k) of the Act:

> "'Secret ballot' means the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election * * * which is cast in such a manner that the person expressing such choice *cannot* be identified with the choice expressed." (Emphasis added. 29 U.S.C. § 402(k).)

Under these statutory provisions, unions must run elections that conform to the democratic principles embodied in the secret ballot mandate. *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n, supra* note 1, at 471-472.

This election was conducted in a 60' x 20' room. Several small adjacent rooms were not used, although available. A small table for marking ballots was placed three feet in front of an elevated officers' bench. Two members of the Election Committee were present throughout the 6:00 a.m. to 6:00 p.m. election. Most of the voting occurred during the last two hours of the day, when the voters were "jammed together * * * elbow to elbow." Up to 50 voters were in the room at one time. Many voters marked their ballots at the aforesaid table and could see each other's ballots as they were marked.

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Others marked their ballots against the walls, and their markings could also be observed by voters several feet away. No one was seen carrying a ballot to the back of the hall to vote, and some members deliberately "flaunted their votes." There was no encouragement of any members to take steps to prevent others from seeing their ballots. Such loose polling procedures violate the secret ballot requirement of the Act. *Hodgson* v. *United Mine Workers of America*, 344 F.Supp. 17, 30 (D.D.C. 1972). There was no observation of the requirement of Section 3(k) that votes be cast in such a manner that "the person expressing [his] choice cannot be identified with the choice expressed."

Defendants claim that the Secretary's position with respect to ballot secrecy is inconsistent with his regulation on the subject. 29 C.F.R. § 452.97(a) (1774) provides:

> "A prime requisite of elections regulated by Title IV is that they be held by secret ballot among the members or in appropriate cases by representatives who themselves have been elected by secret ballot among the members. A secret ballot under the Act is 'the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice * * * cast in such a manner that the person expressing such choice cannot be identified with the choice expressed.' [Quoting 29 U.S.C. § 402(k).] Secrecy may be assured by the use of voting machines or, if paper ballots are used, by providing voting booths, partitions, or other physical arrangements permitting privacy for the voter while he is making his ballot. The ballot must not contain any marking which upon examination would enable one to identify it with the voter. Balloting by mail presents special problems in assuring secrecy. Although no particular method of assuring such secrecy is prescribed, secrecy may be assured by the use of a double envelope system for return of the voted ballots with the necessary voter identification appearing only on the outer envelope."

On analysis, it is apparent that under this regulation a voting booth "or other physical arrangements permitting

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privacy for the voter" may be used to assure the secrecy of the ballot, but secrecy must be assured. Since the use of the secret ballot is mandatory and not optional, the arrangements for voting at the June 1970 election satisfy neither the statute nor the regulation.

Defendants' argument that every voter had an opportunity to make his ballot secret by going to an unpopulated area within the large room or to one of the small rooms or by guarding his vote from observation must fail. But see *Shultz v. Local 420, Aluminum Workers*, 74 LRRM 2281 (N.D. N.Y. 1970). The statutory mandate is for a vote that "cannot" be identified with the voter. In many cases, requiring a union member to make a great show of securing his secrecy may be tantamount to indicating his vote. The Act requires a mandatory secret ballot, not one permitting a voter to mark his ballot in secret with the danger of identification implicit in securing that secrecy.

In rejecting the Secretary's claim that the secret ballot requirement of the Act had not been observed, the district judge was especially motivated by the fact that "the evidence did not indicate that the lack of a voting booth or similar apparatus for secret voting may have affected the outcome of the election."[9] This was contrary to the holding in *Hotel Employees* that once a violation is established by a preponderance of the evidence, a *prima facie* case has been made that the outcome of the election was affected. See 391 U.S. at 505-509. According to our reading of the record, these defendants did not meet that *prima facie* case.

Fed. R. Civ. P. 52(a) provides that a district court's fact findings cannot be reversed on appeal unless found to be clearly erroneous. While this Court reverses the judgment of the court below, it is not necessary to hold any of the district judge's findings clearly erroneous. The basis for the reversal is legal rather than factual. Thus we accept both the district court's endorsement of the parties' stipulation and the facts as found by the dis-

[9] Section 402(c) of the Act requires a new, supervised election if a violation of Section 401 (note 2 *supra*) "may have affected the outcome of an election" (29 U.S.C. § 482(c)).

trict court after the hearing. We are overturning only the legal conclusions that the candidacy restriction was reasonable and that there was a secret ballot within the meaning of the Act.

The order of the district court is reversed with directions to enter judgment for the Secretary.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 4159—The Scheffer Press, Inc., Chicago, Illinois—8-5-75—250

Letter dated July 7, 1975 to Motley, J.

3150a

LAW OFFICES
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MARVIN SCHWARTZ
BURTON M. EPSTEIN

(212) 691-2250

July 7, 1975

Hon. Constance Baker Motley
United States District Judge
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Re: Hodgson v. IOMM&P
72 Civ. 5031 (CBM)

Dear Judge Motley:

With further reference to my letter of June 25, 1975, this is to advise you that Captain Scavo and Captain Johnson were officially installed as the International President and International Executive Vice President of the International Organization of Masters, Mates and Pilots at a meeting of the General Executive Board in San Francisco on Tuesday, July 1, 1975. Captain O'Callaghan administered the oath of office.

Very truly yours,

Marvin Schwartz

MARVIN SCHWARTZ

MS:eml

CC: Dennison Young, Jr., Esq.

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JUL 07 1975
JUDGE MOTLEY'S CHAMBERS

91

Letter dated June 25, 1975 to Judge Motley

LAW OFFICES
MARVIN SCHWARTZ, P. C.
243 WAVERLY PLACE
NEW YORK, N. Y. 10014

MARVIN SCHWARTZ
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(212) 691-2250

June 25, 1975

Hon. Constance Baker Motley
United States District Judge
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Re: Hodgson v. IOMM&P
72 Civ. 5031 (CBM)

Dear Judge Motley:

The run-off election for International President and the run-off election for International Executive Vice President has just been completed. The incumbent International President, Captain O'Callaghan and the incumbent International Executive Vice President, Captain Caldwell were both defeated.

I am submitting this letter and the information contained therein in further support of the position set forth in our Cross-Motion for Summary Judgment to Dismiss the Complaint and in further support of our papers submitted in opposition to the Government's Motion for Summary Judgment.

Under the circumstances, I think a conference with Your Honor would be particularly useful in moving forward toward a final resolution of this matter.

Respectfully yours,

MARVIN SCHWARTZ

RECEIVED
JUN 26 1975
JUDGE MOTLEY'S CHAMBERS

MS:eml

CC: Dennison Young, Esq.

Letter dated March 3, 1975 to Mr. Young from Motley, J.

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

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U. S. ATTORNEY
1975 MAR -7 AM 9:42
S. D. N. Y.

CHAMBERS OF
CONSTANCE BAKER MOTLEY

March 3, 1975

Dennison Young, Jr.
Assistant United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

Re: Hodgson v. IOMMP
72 Civ. 5031

Dear Mr. Young:

After briefly reviewing the papers submitted with respect to the pending motions for summary judgment, I agree with your suggestions as outlined in your letter of February 5, 1975.

Accordingly, with respect to the Government's motion the Government may reply to defendant's responding papers, and with respect to the defendant's motion the Government need not respond until the Government's motion is decided.

Sincerely yours,

Constance Baker Motley

CBM:rt

cc: Marvin Schwartz, 243 Waverly Pl., NYC
Ernest Allen Cohen, Jaffe Cohen Berman & Crystal,
275 Seventh Avenue, NYC

Letter of February 12, 1975 from Judge Motley to Mr. Cohen

February 12, 1975

Ernest Allen Cohen, Esq.
Jaffe Cohen Berman & Crystal
275 Seventh Avenue
New York, New York 10001

Re: Hodgson v. IOMMP,
72 Civ. 5031

Dear Mr. Cohen:

The court interprets your letter of February 6, 1975 as an application for leave to intervene or appear as amicus curae.

Leave to file an amicus brief due March 21, 1975 is granted.

Sincerely yours,

CBM:rt

Constance Baker Motley

cc: Dennison Young, Jr.
AUSA (SDNY)

Marvin Schwartz, Esq.
243 Waverly Place
New York, New York 10014

JAFFE COHEN BERMAN & CRYSTAL
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3154

February 6, 1975

RECEIVED
FEB 10 1975
JUDGE MOTLEY'S CHAMBERS

Honorable Constance Baker Motley
United States District Court
Southern District of New York
U.S. Court House
Foley Square
New York, New York 10007

Re: James D. Hodgson, Secretary of Labor, United States Department of Labor
Vs. International Organization of Masters, Mates and Pilots, International Maritime Division, ILA, AFL-CIO
No. 72 Civ. 5031

Dear Judge Motley:

This law firm represents Captain Frank T. Scavo and Captain Gerald L. Johnson, who are candidates for election respectively as International President and International Vice-President of the defendant in the above captioned law suit.

Our clients are each now included in a run off election being conducted under the auspices of the American Arbitration Association as impartial ballot agency, pursuant to the Constitution of the defendant which requires a run off election to be commenced within thirty days of the Certification Of Results of an election of union officers in which no candidate has received 40% of the valid ballots counted. The run off is conducted between the two candidates receiving the highest number of votes and the offices of International President and International Vice-President are the only two offices for which such a run off is to be conducted, on the basis of the Certification submitted by the American Arbitration Association.

We enclose for your information a copy of such Certification. You will note from the Certification that Captain Scavo finished with 2,112 votes, almost 200 votes more than the incumbent, Captain Thomas O'Callaghan and that Captain Scavo's percentage of the vote was in excess of 39% of the vote. Captain Johnson finished but 16 votes behind the incumbent Captain Caldwell. This law firm also represented Timothy Brown, who was a candidate for International Secretary-Treasurer in the election. Although Mr. Brown was defeated, nonetheless, it was his determination as well as the determination of Captain Johnson and Captain Scavo, that the election as a whole was a proper, valid and fair election and that the incumbent candidates did not enjoy an advantage affecting the outcome of the election as a result of any activity relating to the 1971 election. Thus, each of our clients has concluded that any tainting of the 1971 election did not affect a tainting of the election conducted in 1974 and certified on behalf of the American Arbitration Association on January 22, 1975.

We have reviewed on behalf of our clients a pending action bearing the above caption and motions pending before you by each of the parties for Summary Judgment. We believe that the papers submitted on behalf of both parties do not adequately present the position of our clients as candidates and as members of the defendant and that moreover, the positions asserted by the parties would create serious and overwhelming mischief for the defendant and its members, which are totally inconsistent with the objectives of the statutory scheme of the Labor Management Reporting and Disclosure Act.

We therefore request that we be permitted to be heard and to submit papers with respect to this issue, either as amicus curae or intervenors. In the event that Your Honor would prefer that our clients submit a formal Application To Appear in either capacity rather than to determine this issue on the basis of this letter, we would appreciate Your Honor withholding action with respect to the Motion and Cross Motion for Summary Judgment until we can have the opportunity to present a formal Application on behalf of our clients to be heard, either as amicus curae or as intervenors.

Our clients are extremely disturbed that the Secretary of Labor has confused the possible remedy of a supervised rerun election with a right to have such an election conducted. Thus, at page 103-104 of plaintiff's Memorandum in support of its Motion For Summary Judgment, the plaintiff stated, "The fact the IOMM&P is now conducting another election for officers must not and should not deprive the Secretary from having the Court impose such a new election on the IOMM&P." Moreover, at page 106 of its Memorandum, the plaintiff states, "Although the present election with respect to Off Shore Division Vice-President - - is being conducted pursuant to the bylaw provisions, attempting to rectify the illegal provisions that does not deny the Secretary his right to a court ordered election under his supervision." The fundamental reason why supervised elections are permitted under the Labor Management Reporting and Disclosure Act is to protect the rights of the members of a labor union, of insurgent candidates, such as our clients and of the general public from distortion of the democratic processes with respect to union elections. Supervised elections constitute a remedy available to the Secretary of Labor with the approval of the courts, rather than a right of the Secretary of Labor.

It is clear, as argued by the Secretary of Labor that the conducting of a new election does not automatically moot an action instituted by the Secretary of Labor to set aside a prior election. (Wirtz v Local 153, Glass Bottle Blowers Association, 389 US 463 [1968]) It is just as apparent, however, that the conducting of a subsequent election is not irrelevant to the question of whether the action should be mooted. It would appear that two elements must be shown in order to moot the action:

1. That the new election was conducted in accordance with the Constitution of the Union and with fairness to the members of the Union and to insurgent candidates.

2. That there be no ongoing affect which taints the subsequent election based upon the misconduct charged with respect to the prior election.

The Glass Bottle Blowers case makes it clear that procedural fairness is not alone enough to result in automatic mooting, since the new election may be tainted by the conduct of the prior election. Thus, the courts are left free to consider whether a rerun election would serve the best interests of the members, the insurgent candidates and the public. My clients have concluded that the results of the general election which was conducted establish clearly and emphatically that the encumbents did not enjoy a benefit based on their prior misconduct and that the election was conducted in accordance with the constitution and fairly to all parties. Thus, the plaintiff's attempt to disregard this election is justified neither under the language nor the purposes of the law, nor can it be considered anything more than a glorifying of sterile procedure over substance, justice and practicality.

On the other hand, it is equally clear that the 1974 election has not yet been completed and there remains the danger that the rights of union members and candidates may be violated in the conduct of the run off aspect of that election. Thus, although we know that as of today the election has thus far been conducted fairly, we do not know that the same fairness will continue through the balance of the election.

My clients have concluded that the existence of the present law suit is a positive factor in encouraging that the election be conducted with procedural fairness. The granting of defendant's Motion for Summary Judgment, prior to the conclusion of the run-off election may discourage the continuation of the fairness with which the election has thus far been conducted. Thus, the position asserted by the defendants is as shortsighted and subject to mischievous consequences as the position asserted by the plaintiff.

We respectfully request that this Court withhold any decision with respect to this law suit until the run off aspect of the 1974 election has concluded. Thereupon, this Court can be free to determine whether the 1974 election as a whole satisfies the criterion

of procedural fairness and whether it was or was not tainted by the misconduct of the present incumbents with respect to the 1971 election. In the event that the Court should conclude after the conclusion of the run off, that the 1974 election was conducted both with procedural fairness and was untainted by the incumbents misconduct with respect to the 1971 election, then this Court should dismiss the Secretary's request for the holding of a supervised rerun election. The interests of candidates, members and the general public would have been fully satisfied and the requirement of still another election would impose not only overwhelming financial burdens on the candidates and the Union itself, but would also leave the Union with uncertainty as to its leadership and immobilized to protect the interests of its members with respect to dealings with employers, the Coast Guard and others. The fact that vast numbers of members of this Union are at sea at any given time compells a ninety-day period within which ballots can be cast. Since it would take approximately one month to comply with procedures in order to mail the ballots and approximately one month to comply with the procedures in order to certify the results. The Union would be in a continuous state of uncertainty as to its leadership for a minimum period of five months.

Moreover, there is a substantial likelihood that the rerun election would require a run off election as well, which would add another five month period to the time during which the Unions' leadership would be in a state of uncertainty, vulnerability and chaos. If the time of the 1974 election and run off were added to the time of the rerun election, it would mean that almost two years of the three year term of International officers would be spent in the conduct of elections. Such a result would be justified only where absolutely essential to preserve the integrity of the Union. Few labor organizations could survive such benefits being visited upon them by the Secretary of Labor, nor should they be asked to, on the sterile basis set forth by the plaintiff.

We are extremely grateful for the indulgence of the Court in considering the positions set forth in this letter. We wish to note that our clients were confronted with the most bizzare of Hobsons' choices in this matter. On the one hand, they could

Honorable Constance Baker Motley
February 6, 1975
Re: Hodgson v. IOMMP
No. 72 Civ. 5031

choose to sit out the present election on the possibility that a rerun election might occur with the substantial potential that the incumbents would thereby continue in office for another three year term, or on the other hand, they could, as they did, present their candidicies to the members of the Union at vast expense and at enormous disruption of their professional lives with the possibility that were they to be successful, the incumbents would be granted another opportunity to defeat them through the intervention of the Secretary of Labor. Such unfairness to insurgent candidates surely was not contemplated by the framers of the Labor Management Reporting and Disclosure Act, in fact, one must assume that the framers of the Act contemplated precisely the contrary.

Copies of this letter are being furnished to Mr. Young and Mr. Schwartz, as attorneys in this case.

Respectfully submitted,

JAFFE COHEN BERMAN & CRYSTAL

By: Ernest Allen Cohen
Ernest Allen Cohen

EAC/lcs
Enclosure
cc: Dennison Young, Esq.
Marvin Schwartz, Esq.
Honorable H. W. Berry
Capt. Frank Scavo
Capt. Gerald Johnson
Capt. Timothy Brown

Letter dated February 5, 1975 to Judge Motley

WT:JE:ch
72-1[illegible]

February 5, 1975

[illegible]

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
United States Courthouse - Room 2601
Foley Square
New York, New York 10007

Re: Hodgson v. International Organization
of Masters, Mates and Pilots
72 Civ. 3351 (CBM)

Dear Judge Motley:

On December 16, 1974 we moved for summary judgment in the above matter. As you know, our motion focused on just a few of the violations the Secretary of Labor alleges the IOMM&P committed during the course of the 1971 election of union officers, inasmuch as all violations committed need not be proved for the Court to order a new election subject to the supervision of the Secretary of Labor. It is sufficient to show that only one violation occurred which may have affected the outcome of the election.

On January 23, 1975 the IOMM&P responded to the Government's motion, and simultaneously cross-moved for summary judgment, returnable February 6, 1975. The five points on which the union now moves for summary judgment are in fact certain of the additional violations the Government alleges were committed but upon which the Government found no need to seek summary judgment.

In the interest of judicial economy and in an effort to conclude this case and perhaps set the union on a more normal course (in terms of the election of its officers)

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as expeditiously as possible, the Government proposes to reply to the IUMSWP's response to our motion but defer consideration of the union's cross-motion until the disposition of the Government's motion. If the Government's motion is granted, it will become unnecessary to respond to the union's motion.

Such course of action, we submit, is prudent. Should the Court find one (or more) of the violations set forth in the Government's motion were committed, and may have affected the outcome of the election, there would be no need to consider the cross-motion at all; for as demonstrated in Hodgson v. Local Salesmen's Union, Local No. 2, 334 F.Supp. 1307 (S.D.N.Y.), [illegible], 444 F.2d 1344 (2d Cir. 1971) and Wirtz v. American Guild of Variety Artists, 267 F.Supp. 527 (S.D.N.Y., 1967), for example, all that is necessary for the Government to be successful is for there to have been one violation proven which may have affected the outcome of the election in question. If, by chance, the Government's motion were denied, we could then respond to the cross-motion which would not have been prejudiced by its deferral.

Furthermore, the union has recently conducted a new election of officers. A number of the offices require a run-off election.

With respect to the conduct of the 1974 election, we are also informed that a number of complaints have been or will be presented to the union for consideration by defeated candidates or their representatives, or others. The union's General Executive Board will be meeting shortly to consider these complaints. Should the determination be unfavorable to the complainants, it is not unlikely that complaints will be submitted to the Department of Labor for possible investigation. There thus exists the possibility of another action being brought by the Secretary of Labor in connection with the 1974 election, which would be mooted, however, if the Court were to find for the Government on the instance summary judgment motion. This, of course, would be true also for any subsequent action brought by the Secretary regarding the run-off election.

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Had we not been forced to seek four orders from this Court to compel various aspects of discovery (three by Order To Show Cause) it is conceivable we would have been able to move for summary judgment and had a determination earlier, thereby avoiding these additional complications. As it now stands, it will take a relatively short period of time for us to reply to the union's opposition papers but considerably longer, and we believe without there being a necessity for it, to respond to the cross-motion.

The Court, we believe, will have little difficulty in deciding the Government's motion; all that remains, are questions of law which we respectfully suggest will result in a finding for the Government. There is no longer any reason to consider at this time additional issues which may never have to be considered.

Accordingly, we propose to reply to the union's responsive papers and, unless the Court has objection, defer responding to the cross-motion until after the Government's motion is decided.

Respectfully,

PAUL J. CURRAN
United States Attorney

By:

DENNISON YOUNG, JR.
Assistant United States Attorney
Telephone No.: (212) 791-1977

cc: Marvin Schwartz, Esq.
243 Waverly Place
New York, New York

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Letter dated October 15, 1974 from Mr. Young to Mr. Schwartz

DY,Jr.:n

72-3882

October 15, 1974

BY HAND

Marvin Schwartz, Esq.
243 Waverly Place
New York, New York 10014

Re: Hodgson v. International Organization of Masters, Mates and Pilots
72 Civ. 5031 (CBM)

Dear Mr. Schwartz:

Pursuant to a call last Friday, October 11, 1974, from Mr. Reginald Jones of your office informing us that you had lost the copy of "Plaintiff's First Set of Interrogatories" served on you May 17, 1973 and requesting that we provide you with another copy, we are enclosing a copy of said interrogatories herewith.

As you know, on October 3, 1974, at a pre-trial conference, Judge Motley ordered you, inter alia, to answer these interrogatories by today, October 15, 1974. On October 11, 1974 Judge Motley signed a written Order conforming to her October 3, 1974 oral orders, a copy of which we also enclose.

In view of the fact that you would apparently not be able to answer these interrogatories by today, we will consent to a brief extension of time for these purposes, that is until 10:00 A.M. Monday, October 21, 1974. We would like the answers delivered at our office at that time.

We have also consented to taking the depositions of Messrs. Nelson and Valensi during the week of October 28, 1974 rather than the week of October 21, 1974 as we had anticipated and as Judge Motley's Order so recites. The

DY,Jr.:n
72-3882

BY HAND
Marvin Schwartz, Esq.

scheduling of these depositions as well as a number of others, possibly on the West Coast, has been the subject of conversation between you and Assistant United States Attorney Bobby C. Lawyer who is also assigned to this case.

We are anxious to have the information which we requested during the depositions of Captains O'Callaghan and Lowen which, pursuant to Judge Motley's Order, was to be supplied by today, also. We assume you will have it to us by tomorrow at the latest.

To appraise Judge Motley of our consent to extend your time to answer our interrogatories and of the scheduling of the depositions during the week of October 28, 1974, we are sending a copy of this letter to the Court.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: Dennison Young Jr.
DENNISON YOUNG, JR.
Assistant United States Attorney
Telephone No.: (212) 791-1977

cc: Honorable Constance Baker Motley
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007